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No. 82-314

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CARL WHITE, Superintendent, Missouri Training Center for Men, Moberly, Missouri,
Petitioner,

v.

DOUGLAS W. THOMPSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI FROM FINAL JUDGMENT ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

In 1961 a police officer was shot and killed in Cape Girardeau County, Missouri. Douglas Wayne Thompson was convicted of that murder and sentenced to death, Eventually, that conviction and sentence was reversed by the Missouri Supreme Court and Thompson was retried in 1966. Pursuant to State law the Circuit Court judge directed the sheriff to select seventy-two veniremen. Those veniremen were extensively *voir dired* and a petit jury selected. At no time did Thompson's privately retained attorney either inquire into the veniremen selection process or contemporaneously object in any way to the jury selection process.

1. Whether the Eighth Circuit erred by concluding that Thompson could raise the jury selection issue despite the fact that his attorney never contemporaneously objected to, nor on the record inquired into the veniremen selection process; specifically, did the Eighth Circuit define the "cause" part of the *Francis* v. *Henderson* test so broadly as to, in effect, vitiate it.

2. Did the Eighth Circuit err by concluding that Thompson could raise the jury selection issue because he suffered "actual prejudice" in that a sheriff selected the veniremen from which the petit jury was formed; specifically, did the Eighth Circuit err in concluding that the "actual prejudice" part of the *Francis* v. *Henderson* test had been met in light of testimony from Thompson's attorney that Thompson received a fair trial and that the sheriff who selected the veniremen was no way involved with the investigation of a crime which occurred in another county five years earlier.

3. Did the Eighth Circuit err in reversing Thompson's conviction upon concluding that he had met the "cause"

and "actual prejudice" test of *Francis* v. *Henderson* without deciding that the jury selection process was indeed unconstitutional.

4. Whether the jury selection process at issue here was unconstitutional because a sheriff selected the veniremen.

PARTIES

All the parties in this case are listed in the caption of the case.

PETITION FOR CERTIORARI

Petitioner, Carl White, Superintendent, Missouri Training Center for Men, Moberly, Missouri, respectfully requests that a writ of certiorari issue to the Eighth Circuit to review its judgment and opinion issued anent this case on June 4, 1982.

OPINIONS BELOW

The opinion from which this petition flows was handed down by the United States Court of Appeals for the Eighth Circuit on June 4, 1982, in the case styled: *Douglas W. Thompson* v. *Carl White,* No. 81-1092. To the best knowledge of petitioner this opinion has yet to be published.

The Eighth Circuit opinion noted above followed an appeal taken from an order issued by United States District Court Judge Edward L. Filippine, United States District Court, Eastern District, Eastern Division, of Missouri. That Order was issued on January 14, 1981, and denied Thompson's petition for a writ of habeas corpus for the reasons stated in the "Report and Recommendation" of United States Magistrate David D. Noce which was issued on December 17, 1980. To the best knowledge of petitioner neither the Order of Judge Filippine nor the "Report and Recommendation" of the United States Magistrate has been published. The case before the Magistrate and Judge Filippine is styled: *Douglas W. Thompson* v. *Carl White,* No. 77-1122 C(3), United States District Court, Eastern District of Missouri, Eastern Division.

The Order of Judge Filippine was appealed to the Eighth Circuit; on October 14, 1981, the Eighth Circuit issued an opinion in which it concluded that Thompson's Mississippi County conviction was illegally obtained because the jury was unconstitutionally composed. Pursuant thereto the undersigned, on behalf of petitioner, filed on January 12, 1982, a Petition for Writ of Certiorari in which it was requested that this Court review the just-referred to opinion of the Eighth Circuit issued on October 14, 1981.

On April 26, 1982, this Court entered an order granting petitioner's Petition for Writ of Certiorari and remanded the case to the Eighth Circuit for further consideration in light of *United States* v. *Frady*, 50 U. S. L. W. 4388 (April 5, 1982, No. 80-1595).

On June 4, 1982, without any further briefing or oral argument, the Eighth Circuit issued a four page opinion in response to this Court's Order of April 26, 1982. The Eighth Circuit's cursory four page opinion of June 4, 1982, basically affirmed the Eighth Circuit's earlier opinion in this case; once again that court concluded that Thompson's Mississippi County conviction ought to be reversed. On the same date of its June 4, 1982, opinion the Eighth Circuit issued its mandate and remanded the case to the District Court for further proceedings.

On June 14, 1982, Judge Filippine issued an order in *Thompson* v. *White*, No. 77-1122 C (3), vacating Thompson's Mississippi County conviction and directing that the State of Missouri commence prosecution of Thompson within sixty days; on June 23, 1982, petitioner filed a "Motion for Additional Time Within Which to Commence Prosecution of [Thompson]." Petitioner requested this additional time in order to allow him to file this instant

Petition for a Writ of Certiorari. Petitioner's motion for additional time, filed with Judge Filippine, has yet to be ruled upon.

The October 14, 1981, opinion of the Eighth Circuit will be found in Appendix A of this petition; the June 4, 1982, opinion of the Eighth Circuit will be found in Appendix B of this petition; the January 14, 1982, Order of Judge Filippine, and the December 17, 1980, "Report and Recommendation" of United States Magistrate Noce will be found in Appendix C of this petition; and, the June 14, 1982, Order of Judge Filippine and petitioner's motion for additional time, filed in response thereto, will be found in Appendix D of this petition.

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JURISDICTIONAL STATEMENT

Title 28 U.S.C. Section 1254(1) states that cases in the Courts of Appeals may be reviewed by this Court

> By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Title 28 U.S.C. Section 2101(c) states that:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. . . .

X

In October, 1977 Thompson filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. Section 2254 in the United States District Court for the Eastern District of Missouri, Eastern Division. In that petition Thompson challenged the state conviction of murder which was obtained in Mississippi County, Missouri, in 1966. The United States District Court denied the petition on January 14, 1981. However, on October 14, 1981, the United States Court of Appeals for the Eighth Circuit reversed the district court and determined that the writ should issue because Thompson's 1966 conviction was illegal. On July 12, 1982, petitioner filed a Petition for Writ of Certiorari in which was requested that this Court review the Eighth Circuit opinion of October 14, 1981. On April 26, 1982, this Court entered an order granting that petition and thereafter remanded the case to the Eighth Circuit for further consideration in light of *United States* v. *Frady*, 50 U.S.L.W. 4388 (April 5, 1982, No. 80-1595). On June 4, 1982, the Eighth Circuit issued a second opinion basically affirming its conclusion of October 14, 1981. Also, on June 4, 1982, the Eighth Circuit issued its mandate and remanded the case to the district court for further proceedings. On June 14, 1982, the district court issued an order directing the State of Missouri to commence prosecution of Thompson within 60 days; on June 23, 1982, petitioner filed a "Motion for Additional Time Within Which to Commence Prosecution of [Thompson]." Petitioner requested this additional time in order to allow him to file the instant petition. Petitioner's motion for additional time, filed with the district court, has yet to be ruled upon.

The Eighth Circuit's June 4, 1982, decision is properly sought to be reviewed by a request of certiorari to that court and is made 90 days from that date.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article VI, United States Constitution:

ARTICLE VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Title 28 U.S.C. Section 2254:

§ 2254. State custody; remedies in State courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the

law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the exist-

ing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

Section 494.290, RSMo 1959:

494.290. Court may order new panel or additional jurors, when.—Courts having civil and criminal jurisdiction shall have power, whenever the grand or petit jury shall have been discharged, and it shall become necessary to have another jury, to order and require the sheriff, or other proper officer at the same term or session of said court, or at any adjourned or special term of such court, to summon from the citizens of the county having the requisite qualifications for jurors, a new panel of petit or grand jurors, and to order the sheriff or other proper officer to summon a standing petit jury whenever the board of jury commissioners shall have failed to select such petit jury; and whenever a greater number of petit jurors are required than the regular panel, or in case any juror shall fail to attend at the term required, the court may order the sheriff or other proper officer to summon a sufficient number of jurors as the occasion may require.

STATEMENT OF THE CASE

On October 21, 1977, Mr. Douglas W. Thompson, hereinafter Thompson, while a prisoner incarcerated at the Missouri State Penitentiary in Jefferson City, Missouri, filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. Section 2254 in the United States District Court for the Eastern District of Missouri, Eastern Division, attacking his 1966 conviction obtained in Mississippi County, Missouri, for the murder of a police officer which occurred in Cape Girardeau County, Missouri, on March 10, 1961. The facts relative to this murder are setout in detail in *State* v. *Thompson,* 363 S.W.2d 711 (Mo. banc 1963).

Thompson was originally convicted of the offense at issue here in the Circuit Court of Bollinger County, the case being transferred to that county on a change of venue, in 1961, and sentenced to death. The conviction and sentence affirmed on direct appeal. *State* v. *Thompson,* 363 S.W.2d 711 (Mo. banc 1963). That case will be referred to as Thompson I.

In 1964 Thompson filed a Motion for Post Conviction Relief under Missouri Supreme Rule 27.26. Ultimately, the Missouri Supreme Court vacated the sentence and conviction on the ground that the State had suppressed material evidence, i.e., cartridge cases found at the scene of the shooting and in Thompson's automobile. *State* v. *Thompson,* 396 S.W.2d 697 (Mo. banc 1965). That case will be referred to as Thompson II. Thompson was retried in 1966, convicted, and sentenced to life in prison. No appeal was filed. It is this conviction which is at issue here.

On September 10, 1975, Thompson filed another Motion for Relief from the 1966 conviction under Rule 27.26.

In this motion he alleged that (1) his conviction was obtained by the deliberate use of false and perjured testimony, which allegation included the argument that he was not convicted upon substantial or sufficient evidence; (2) that his conviction violated the prohibition against double jeopardy; (3) that the jury was unconstitutionally selected; (4) that the jury was improperly instructed on the law of the case; and, (5) that the trial court refused to provide him with a copy of the jury instructions. That motion was denied, which denial was affirmed on appeal as to all issues except that concerning whether the jury was unconstitutionally selected. The jury selection issue was remanded for an evidentiary hearing. *Thompson* v. *State,* 576 S.W.2d 541 (Mo.App., 1978). That case will be referred to as Thompson III. In so ruling, the State appellate court determined from the record that Thompson's failure to appeal the 1966 conviction was a deliberate, voluntary, and knowledgeable bypass of his right to appeal. Such bypass, the State appellate court ruled, disposed of Thompson's allegations of instructional error and of the failure to provide him with a copy of the instructions. The State court ruled upon the remaining contentions on grounds other than procedural bypass. The State court determined that Thompson's allegations of the knowing use of perjured testimony was factually identical to the allegation treated by the Missouri Supreme Court in 1965 and that it was precluded by that earlier ruling. The State court also ruled that the claim of insufficient evidence was not cognizable under Rule 27.26. And, the State court overruled Thompson's double jeopardy claim upon the trial record.

On October 21, 1977, Thompson filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Eastern District of Missouri, Eastern Di-

vision, alleging that his 1966 Mississippi County conviction was improper for, basically, those reasons set forth above in his 1975 state attack upon the 1966 conviction. On May 1, 1979, Carl White, Petitioner herein, responded to Thompson's Petition for a Writ of Habeas Corpus by asserting various procedural defenses to Thompson's claims, including the assertion that the federal judiciary was without the authority to review the jury selection issue because of Thompson's failure to contemporaneously object to the jury selection process.

On March 10, 1980, Thompson moved for the removal of the jury selection issue from the State courts to the Federal District Court; on March 26, 1980, Thompson further requested that an evidentiary hearing be held on all issues pending before the District Court, including the jury selection issue. On May 21, 1980, Thompson's motions were granted and evidence was received on July 16 and 26, 1980.

On December 17, 1980, the United States Magistrate, David D. Noce, issued a "Report and Recommendation" concluding that Thompson's 1966 conviction was legal and should be affirmed. Shortly thereafter, United States District Court Judge Edward L. Filippine adopted the Magistrate's "Report and Recommendation" and affirmed Thompson's 1966 Mississippi County conviction.

Upon appeal the Eighth Circuit reversed the decisions of the Magistrate and United States District Court Judge, and the State courts, and concluded that the jury selection process was unconstitutional and therefore Thompson ought to be either freed or retried. The Eighth Circuit concluded that despite any failure of Thompson to contemporaneously object, in 1966, to the jury selection process, the "cause" and "prejudice" test enunciated by this

Court in *Francis* v. *Henderson*, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976), had been met.

Thereafter, on January 12, 1982, petitioner White filed in this Court a Petition for Writ of Certiorari to review the above-referred to October 14, 1981, opinion of the Eighth Circuit. This Court's number for that petition was 81-1319. On April 26, 1982, this Court issued an Order in No. 81-1319 granting petitioner's petition, and pursuant thereto vacated the October 14, 1981, opinion of the Eighth Circuit and remanded the case back to that court for further consideration in light of *United States* v. *Frady*, 50 U.S. L.W. 4388 (April 5, 1982, No. 80-1595). Thereafter, on June 4, 1982, without further briefing or oral argument the Eighth Circuit issued a cursory four page opinion in which it purported to review its October 14, 1981, opinion in light of *United States* v. *Frady, supra;* in an analysis as superficial as the one utilized on October 14, 1981, the Eighth Circuit concluded on June 4, 1982, that "actual prejudice" existed allowing Thompson to raise, and have the federal judiciary decide, his argument that the jury which convicted him was unconstitutionally composed. On the same date, June 4, 1982, in which the Eighth Circuit issued the opinion challenged by petitioner here, that court also issued its mandate in the case remanding back to the district court.

On June 14, 1982, Judge Filippine in the cause styled *Thompson* v. *White*, No. 77-1122 C (3), United States District Court, Eastern District of Missouri, Eastern Division, issued an Order directing, *inter alia*, that the State of Missouri commence prosecution of Thompson within sixty days. Thereafter, on June 23, 1982, petitioner White filed with Judge Filippine a "Motion for Additional Time Within Which to Commence Prosecution of Petitioner" in order to allow petitioner time to file another Petition

for Writ of Certiorari in this Court so that the June 4, 1982, opinion of the Eighth Circuit could be reviewed and reversed.

Petitioner Carl White, Superintendent, Missouri Training Center for Men, Moberly, Missouri, requests that this Court issue a writ of certiorari to the Eighth Circuit so that this Court may review the standards set forth in *Francis* v. *Henderson*, and determine whether the Eighth Circuit's two superficial analyses of that test vis-a-vis the facts in this case is appropriate.

THE REASONS FOR GRANTING THE WRIT

The Eighth Circuit, in its October 14, 1981, stated:

> The sole issue before us is whether the district court erred in its dismissal of the jury selection issue.
>
> The state argues that we are precluded from reviewing the jury selection claim because of Thompson's failure to object at the time of his trial. Thompson responds that he was unaware of the standards concerning the selection of jurors because, at that time, the case enunciating the standards had not yet been decided. Also, Thompson claims that it was unknown to all the parties that the sheriff had deviated from the statutory random selection procedure. In fact, it was not until counsel was appointed by the federal district court in the instant case that the parties discovered the problem and entered into the stipulation which reveals that the entire jury panel was selected by the sheriff.
>
> The bar of a state contemporaneous rule is not absolute. Under the rule enunciated by the Supreme

Court, such a bar can be lifted if adequate cause for the failure to object exists and prejudice to the defendant can be shown. *Wainwright* v. *Sykes*, 433 U.S. 72, 80-91 (1977); *Francis* v. *Henderson*, 425 U.S. 536, 542 (1976).

In the present case both factors are satisfied. In light of the fact that Thompson did not know nor had reason to suspect that the statutory procedure was not being followed, he certainly had 'cause' not to object. We also recognize that the 'grizzly choice' between life imprisonment and execution facing Thompson provided him with an additional incentive not to appeal. *See Fay* v. *Noia*, 372 U.S. 391, 439-40 (1963). As will be discussed later in the opinion, we also find that prejudice existed because the sheriff personally selected the veniremen for the trial of an individual accused of killing another law enforcement officer.

Thompson v. *White*, Eighth Circuit No. 81-1092, October 14, 1981, at Slip Op. 5-6.

Petitioner believes that the Eighth Circuit's examination of *Francis* v. *Henderson*, and its misapplication in this case, dictates that a writ of certiorari be issued.

The Eighth Circuit's opinion not only misconstrues this Court's announced test in *Francis* v. *Henderson*, but disregards and contradicts all other cases on the subject.

First, the Eighth Circuit states that Thompson's lawyer had no reason to suspect that the statutory procedure was not being followed anent the jury selection process, and that therefore he had "cause" not to object.

Initially, Petitioner objects to the Eighth Circuit's conclusion that the jury was selected in violation of Mis-

souri law. The process by which the jury was selected in this case comports with Missouri law which allows a sheriff to go out and select a special venire when an insufficient number of jurors is available. This subject, and the Petitioner's assertion that the jury was constitutionally selected, will be dealt with later. At this point Petitioner's primary thrust is that Thompson has wholly failed to show any "cause" for failing to contemporaneously object to the jury selection process.

In this regard Petitioner points out that the Eighth Circuit's reference to *Fay* v. *Noia*, 372 U.S. 391, 83 S.Ct. 882, 96 Ed.2d 837 (1963) and the "grizzly choice" between life imprisonment and execution is irrelevant to determining whether Thompson has met the "cause" and "prejudice" test of *Francis* v. *Henderson*. What we are dealing with is whether a contemporaneous objection at trial, and during the *voir dire* process, should have been made; the issue is not whether Thompson deliberately bypassed his right to appeal *after* his conviction.

It cannot be over-emphasized that the burden is squarely upon Thompson to unequivocally establish that there was in fact "cause" for his trial attorney's failure to object to the jury selection process, that the jury selection process was in fact unconstitutional, and that "actual prejudice" flowed to Thompson therefrom. As stated by the Court in *Tennon* v. *Ricketts*, 574 F.2d 1243, 1245 (5th Cir. 1978):

> On collateral attack, state is under no burden to show that waiver of right to file timely objections to composition of grand jury was knowingly and understandingly made; to the contrary, he who tardily brings claim must make showing of cause for the failure and must also make showing of actual prejudice.

It may be that the only way a petitioner can establish "cause" for the failure to object to an allegedly unconstitutional jury selection process is by proving incompetency of counsel. *See, Arnold* v. *Wainwright*, 516 F.2d 964 (5th Cir. 1975). But, at the evidentiary hearing held before United States Magistrate Noce, Thompson's counsel in this action, Mr. T. Scott Richardson, stated:

> Mr. Thompson is not alleging incompetency of counsel by Mr. Herd. [Mr. Herd was Thompson's trial counsel in 1966 at Mississippi County.] Quite to the contrary, at the hearing and through any communications with me, Mr. Thompson has had nothing but the greatest of praise for Mr. Herd. On the record, at the hearing, he stated that Mr. Herd saved his life. I certainly don't think that statement is consistent with an allegation of incompetency of counsel.
>
> The issue is not incompetency of counsel. . . .

United States District Court Hearing Transcript (St. Louis) at p. 26.

Mr. Herd testified before Magistrate Noce that he did not attack the jury selection process for tactical reasons. Mr. Herd testified, anent this issue, as follows:

> Q. [By Mr. Richardson:] You, of course, conducted a *voir dire* examination at that time?
>
> A. [By Mr. Herd:] I did.
>
> Q. Did you make any inquiries as to the jury selection procedures in Mississippi County as they were handled at that time?
>
> A. In full answer to that, I would have to tell you that I retained counsel—his name was Jim Haw. I went down a couple of days beforehand to get my

last-minute preparation done, and I went over entirely with him the jury list. I am sured that he told me, at that point, generally how the jury was selected in the sense that who would be on the jury, what I would be seeing, etc.; but I don't recall that the jury selection process, as such, was ever discussed.

Q. This was in 1966; correct:

A. Yes, sir.

Q. You made no motion to quash the entire jury panel based on any type of unconstitutional jury selection procedures?

A. No, sir, because I was unaware there was any basis to do so, in fact.

Q. This was, in fact, before many of the landmark decisions about jury selection procedures,

A. I would have to say it was. It never occurred to me because I felt—it never occurred to me. I have to say that, very frankly.

Q. Furthermore, for the record, Mr. Thompson is a white individual; is that true?

A. Yes, sir.

Q. And the jury selected—let me ask you that—the jury veniremen that were summoned, was there any black individuals on the jury?

A. There were.

Q. The twelve men that were selected for the jury, were there any blacks on there?

A. No, there were not.

Q. Did you strike any black individuals if you will recall?

A. I have my trial notes here and I went over that last night understanding what I thought the issues that I would be interrogated about would be here today. My notes are not conclusive about that. I know there were blacks on the jury because I have them marked as blacks.

Q. You were talking about the venire panel?

A. I am sorry, on the venire panel. I think there were total of about sixty veniremen who were *voir dired*, and they were done in groups of about a dozen at a time, and, unfortunately, my notes are not so complete that I can answer your question with great exactness. But I do know that there were blacks on the panel. My notes seem to indicate that there were three. I do know that there were none on the jury ultimately selected to hear the case. I do know that there were reasons why I would not want them on the jury in that county, and it may be that is why they were—it may be I struck them off, but my notes do not clinically reflect that I, in fact, did so.

Q. Could you expand upon the reason why you would not want a black that was brought in on a venire call to be called on your jury in that case?

A. Prior to going over to Mr. Haw's office—that's H-a-w for the record, I think that's the way he spells his name—I was told he was a very competent trial lawyer and that he tried a number of criminal cases and had recently tried a case involving a black murder case—that is to say, where the victim was black and where the defendant was black.

I have been told that of the lawyers available locally he was the man to contact. So, I took the jury list to him; and we talked about every name on that list at great length. And I have notes here with me here today that reflect some of the impressions that he gave me concerning not just the veniremen but those who ultimately were left on the panel on the jury.

And during my conversations with him, I talked about blacks because, very frankly from a defendant's standpoint, I think there is a great advantage to having blacks on a jury. I have always felt that way because I think they understand such things as police brutality and such in a way that no white man can ever understand it. These things were candidly discussed with Mr. Haw and me.

But he told me a piece of psychology, and he gave me a warning about the use of blacks in that county. And I wanted to make certain in this record I am not speaking like a bigot. I have had black jurors time after time, and I prefer them in a criminal case. But he indicated to me that in Mississippi County in those days that blacks—I don't know how to express it other than to say kowtow to whites—and that there were very few blacks who had meaningful jobs in society and very few blacks were on professional positions, if any, that the majority of blacks in that county were sharecroppers and were left over from the cotton fields and that on any windy day, in his judgment, they could not stand up to the expression of an opinion contrary to theirs given by the white man, and that was due to the social complexion of that county at the time as he explained it to me.

> And therefore, I did not feel that I wanted on this jury anybody who didn't have the guts in his belly and who would be afraid to stand up for his convictions. And that, sir, is the reason why I would not have considered seriously blacks for this jury.
>
> I am not certain that I did strike blacks; but if I did so that would probably have been the reason. I don't know if that hurts or helps Wayne Thompson, but that is the honest truth.
>
> May I add one thing to my last statement?
>
> I was asked why I wouldn't want blacks. I would say there were, obviously, many other types of people who I would not want on that jury for that case and they were also discussed, they had nothing to do with racial complexion.

United States District Court Hearing Transcript (St. Louis) at pp. 62-64.

It goes without saying that a tactical decision on the part of an attorney is wholly insufficient "cause" to allow the Federal judiciary to review the substance of an inmate's jury selection claim. As stated by the Court in *Satterfield* v. *Zahradnick*, 572 F.2d 443, 446 (4th Cir. 1978):

> We need not attempt to place precise limits on the meaning of cause to observe that this type of calculated, tactical trial decision has never been held to avoid the preclusive effect of state procedural defaults in subsequent federal habeas proceedings. [Citations omitted.]

See also, *Rodriguez* v. *Estelle*, 536 F.2d 1096 (5th Cir. 1976). It is also enlightening to read what the Court in *Arnold* v. *Wainwright*, *supra*, had to say in this regard:

> In Florida the rule is well established that challenges to the petit jury selection system must be mounted prior to the question of any individual juror. Without attempting to hypothesize a set of circumstances sufficient to excuse failure to make a timely jury challenge, we hold here simply that a petitioner whose attorney takes no steps to determine whether there is any basis for such a challenge may not later utilize federal habeas corpus procedure to obtain relief from his waiver under state procedural rules.

Id., 516 F.2d at 972. And, as stated by the Court in *United States* v. *Hawkins*, 566 F.2d 1006, 1013 (5th Cir. 1978):

> 'One who fails to assert challenges before or during voir dire is foreclosed from later tardy actions which attack the validity of the jury plan.' [Citations omitted.]

Furthermore, the transcription of the 1966 Mississippi County trial establishes that Mr. Herd engaged in detailed, extensive, and exhaustive *voir dire* at Thompson's 1966 Mississippi County trial (Mississippi County Circuit Court Transcript at pp. 41-228). Seventy-two potential jurors were called and examined by both Mr. Herd and the prosecuting attorney, Mr. Burlison. An examinaion of the relevant one hundred and eighty pages of the Circuit Court Transcript reveals that Mr. Herd vigorously represented Thompson by pointedly and forcefully questioning all seventy-two potential jurors. The most striking fact to be derived from those one hundred and eighty pages is that at no time did Mr. Herd object, in any way, to the method by which the jury selection system proceeded; indeed, and most dispositively, Mr. Herd at no time inquired into the nature of that process.

In light of the foregoing it is extraordinary that the

Eighth Circuit helps Thompson over the "cause" hurdle of the *Francis* v. *Henderson* test solely by use of the following phrase: "Thompson did not know nor had reason to suspect that the statutory procedure was not being followed. . . ." This is an incredible statement in light of what has been presented. Not only did Mr. Herd engage in vigorous and extensive *voir dire* examinations, he contacted competent local counsel to help him with the jury selection process. Mr. Herd testified that he had no reason to object to the jury selection process, and made no effort to determine what process was used in gathering together the veniremen. The Eighth Circuit decided to ignore not only the facts in this case but all the decisional law which pertains to it. There is no other case that so blithely does away with an attorney's obligation to ferret out, investigate, and conclusively determine the procedure used in a jury selection process. Unquestionably, it is defense counsel's duty to make such an investigation and determine the process used; if the defense attorney does not investigate the jury selection process he can not later come into court and argue that although he chose not to investigate the jury selection process during the trial he may now attack the alleged illegality since he has discovered irregularities in that process many years after conviction. Indeed, it is inconceivable that Mr. Herd did not investigate the whole jury selection process in light of his testimony that he went over the veniremen in detail with local counsel. Mr. Herd further testified that the reason he did not attack the jury selection process was because he did not think it was illegal. Whether that conclusion was erroneous on his part, in hindsight, is irrelevant. Mr. Herd made a tactical decision not to attack the jury selection process, which he clearly investigated, and found legal. Additionally, it must be noted that this trial occurred in December 1966, yet *Swain* v. *Alabama*, 380 U.S.

202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) a decision Thompson's present lawyer has called the "landmark" case in the area, was decided March 8, 1965; so, some lawyers out there were thinking about jury selection processes eighteen months before Thompson's trial. At least Swain's lawyers had thought about it.

Indeed, the October 14, 1981, opinion of the Eighth Circuit affirmed by that court on June 4, 1982, is directly contrary to this Court's recent decision in *Engle* v. *Isaac*, 50 U.S.L.W. 4376 (April 5, 1982, No. 80-1430). In *Engle* this court had occasion to discuss the "cause" prong of the test found in *Francis* and *Wainwright*. In *Engle* Isaac's attorney failed to comply with an Ohio rule mandating contemporaneous objections to jury instructions. It was argued before this Court that Isaac's attorney had "cause" for failing to contemporaneously object to the pertinent jury instructions because "they could not have known at the time of their trials that the Due Process Clause addresses the burden of proving affirmative defenses. [And], they contend that any objection to Ohio's self-defense instruction would have been futile since Ohio had long required criminal defendants to bear the burden of proving this affirmative defense." It was urged in *Engle* that a criminal defendant "may not waive constitutional objections unknown at the time of trial."

Such a claim is identical to the one put forth by Thompson in the lower courts, and accepted as sufficient "cause" by the Eighth Circuit.

In response to this contention this Court stated:

> "We need not decide whether the novelty of a constitutional claim ever establishes cause for a failure to object. We might hesitate to adopt a rule that would require trial counsel either to exercise extraordinary

> vision or to object to every aspect of the proceedings in the hope that some aspect might mask a latent constitutional claim. On the other hand, later discovery of a constitutional defect unknown at the time of trial does not invariably render the original trial fundamentally unfair. These concerns, however, need not detain us here since respondents' claims were far from unknown at the time of their trials."

Engle, 50 U.S.L.W. at 4382. [Footnotes omitted.] In the instant case, petitioner has established that the jury selection process at issue here had been raised in *Swain* v. *Alabama, supra,* eighteen months before Thompson's trial. Petitioner does not believe that it required extraordinary vision for Mr. Herd to have inquired into the process by which the jury was selected and composed; indeed, it has been established that Mr. Herd took extraordinary precautions in regard to the composition of the jury, and questioned the veniremen at considerable length and in extraordinary detail. The Eighth Circuit's conclusion, both in its October 14, 1981, and June 4, 1982, opinions, to the effect that Thompson met the "cause" prong of the *Francis* and *Wainwright* test because he "did not know nor had reason to suspect that the statutory procedure was not being followed," is certainly without support either in case law or from the record in the instant case. Indeed, this Court also stated in *Engle:*

> "We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against label-

ing alleged unawareness of the objection as a cause for a procedural default."

Engle, 50 U.S.L.W. at 4383. [Footnote omitted.] The situation in *Engle* is despositively analogous to that presented in the instance case. Certainly, Mr. Herd had the tools and information at his command to attack the jury selection process if he choose to do so; similarly, at the time of Thompson's trial which resulted in the conviction at issue here, other defense counsel perceived the possibility of unconstitutionally composed jurys and proceeded to timely litigate those claims. Again, in this regard, petitioner notes that the Eighth Circuit's opinions of October 14, 1981, and June 4, 1982, blithely ignore both the record in this case and are axiomatically directly contrary to the above quotes taken from this Court's opinion in *Engle*.

Finally, this Court stated in *Engle:*

> "We must also acknowledge that writs of habeas corpus frequently cost society the right to punish admitted offenders. Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. While a habeas writ, may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution."

Engle, 50 U.S.L.W. at 4381. The above quote directly relates to the instant case. Thompson's commission of murder occurred in 1961, and the trial proceedings attacked by Thompson occurred in 1966. Self-evidently, retrial of Thompson at this stage is virtually an impossibility. Certainly, memories of any witnesses which may still be alive will have been blurred and diminished. Indeed, dispersion of witnesses who remain alive may also represent an impossible hurdle to the retrial of Thompson.

In light of the foregoing Petitioner posits that it was fundamental error for the Eighth Circuit to have concluded that there was "cause" for Mr. Herd not to make a contemporaneous objection at Thompson's 1966 Mississippi County trial.

Similarly, the Eighth Circuit has erroneously come to the conclusion that "actual prejudice" flowed to Thompson by virtue of the jury selection process. In this regard the Eighth Circuit states: "We also find that prejudice existed because the sheriff personally selected the veniremen for the trial of an individual accused of killing another law enforcement officer." In coming to this conclusion the Eighth Circuit chose to ignore a statement of Mr. Herd's made at the evidentiary hearing held before Magistrate Noce. Mr. Herd was asked if Thompson received a fair trial in 1966. Mr. Herd replied: "I believe that Wayne Thompson had as a substantial and fair trial as our system with all its imperfections admits to."

> Q. [By Mr. Richardson:] I understand your answer to that question, Mr. Herd, and if I ask you if you felt that he had a fair trial, if the jury selection procedure maintained in use at that time in Mississippi County had previously been determined to be unconstitutionally applied by the Eighth Circuit Court of Appeals would you still feel that Mr. Thompson got a fair trial?
>
> A. I would have to say that it wouldn't make much difference what I felt if the process was innately unconstitutional then he did not have a fair trial. But I would have to say that we did the best we could to select a jury that we felt was best for him. And I am convinced, having reviewed my notes, that the jury that he had was not an innately prejudiced jury against him.

United States District Court Hearing Transcript (St. Louis) at pp. 80-81.

In coming to its conclusion that Thompson was "actually prejudiced" by the jury selection process the Eighth Circuit has made unsupported inferences from the record. The record establishes that the sheriff involved selected veniremen in a county not in any way contiguous, and in fact separated by another county, from the county in which the crime was committed; the Eighth Circuit ignored the fact that the sheriff selected veniremen five years after the offense had occurred; the Eighth Circuit also ignored the fact that the sheriff who picked the veniremen played absolutely no part in the investigation of the crime; the Eighth Circuit further ignored the fact that the record unequivocally establishes that the sheriff who picked the veniremen did not discriminate against them for any illegal reason and chose only those people who were qualified by law. The Eighth Circuit has made the extraordinary *assumption,* unsupported by the record, that because a sheriff in a separate county in regard to a crime that occurred five years earlier selected veniremen, those veniremen must have had a prosecution bias. There is simply no support for such a statement in the record.

Petitioner assumes that it was in light of the foregoing reasons that this Court on April 26, 1982, vacated the Eighth Circuit's opinion and remanded the case back to that court for further consideration in light of *U. S.* v. *Frady,* 50 U.S. L.W. 4388 (April 5 ,1982, No. 80-1595). Basically, this Court concluded in *Frady,* that an inmate collaterally attacking his conviction upon a ground not contemporaneously objected to at trial must clear a significantly higher hurdle than the "plain error" standard in order to meet the "actual prejudice" prong of the *Francis* and *Wainwright* test in order to have his claim

cognizable in federal court. As this Court stated in *Frady*:

> "Contrary to Frady's suggestion, he must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they work to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."

Frady, 50 U.S.L.W. at 4393. [Emphasis in original.]

In this regard it is beyond petitioner's ken how the Eighth Circuit could have found that Thompson met the standard this Court has set out anent the "actual prejudice" prong of the *Francis* and *Wainwright* tests; there is absolutely no evidence in the record showing that Thompson was prejudiced in any way or that his entire trial was somehow infected with prejudice and disadvantage of constitutional dimension; this is especially true in light of the fact that Thompson's retained trial attorney in 1966, Mr. Herd, testified at the evidentiary hearing held before Magistrate Noce "that the jury that he had was not an inately prejudiced jury against him." Mr. Herd also testified at that hearing: "I believe that Wayne Thompson had as a substantial and fair trial as our system with all its imperfections admits to."

It is extraordinary that on June 4, 1982, the Eighth Circuit could have issued a second opinion, in light of this Court's directive of April 26, 1982, in which the Eighth Circuit once again found "actual prejudice" sufficient to allow Thompson to bring his claim in federal court. Petitioner states that the only "actual prejudice" found by the Eighth Circuit comes from its overactive imagination; there is certainly no evidence in the record to support such a fantasy. The following three paragraphs contain the sole reason the Eighth Circuit utilized in concluding that "actual prejudice" existed:

"Turning to the element of "actual prejudice," we are satisfied that under the facts of the case "actual prejudice" existed. We reach our holding in light of the facts that the selection of the jury to hear the case of the murder of a police officer was by a fellow law enforcement officer and that the sheriff selected the entire jury panel. The parties stipulated "Sheriff Simmons personally selected potential jurors on the basis of people he knew whom 'he thought would make good jurors.'" Thompson v. White, *supra*, 661 F.2d at 105-107.

By placing such a person in charge of selecting the jury, defendant was deprived of due process. As an example of the prejudice that must be shown to satisfy the "actual prejudice standard," the Supreme Court in *Frady* referred to Henderson v. Kibbe, 431 U.S. 145, 154 (1977), wherein the Court held that in a collateral attack of a conviction pursuant to 28 U.S.C. § 2254, the contested jury instruction must have "so infected the entire trial that the resulting conviction violates due process." (Citations omitted) United States v. Frady, *supra*, 50 U.S.L.W. at 4392.

As we have said previously in this case "[t]he potential for a conviction prone jury under such a system is substantial. . . . [F]undamental fairness to the defendant requires some method better designed to obtain an impartial jury than the sheriff hand-picking from his acquaintances." (Citations omitted). Thompson v. White, *supra*, 661 F.2d at 106 n.7 (quoting Henson v. Wyrick, 634 F.2d 1080, 1082-83 (8th Cir. 1980), *cert. denied*, 450 U.S. 958 (1981)). Clearly, the taint inflicted on the proceedings by the use of this jury selection technique satisfies the Supreme Court's actual prejudice" test as outlined in *Frady*."

Appendix A at 3-4.

Petitioner believes that the Eighth Circuit found "actual prejudice," as defined by this Court in *Frady*, because it wanted to and not because there is any evidentiary support for such a conclusion. The only evidence in the record on this issue comes from Mr. Herd, to the effect that Thompson received a fair trial and that the jury was not inately prejudiced against him. In light of such testimony, how the Eighth Circuit can conclude that Thompson has shown substantially more than "plain error," how it confirmed that he has shown that the entire trial was infected with prejudice and unfairness, is not only extraordinary, it smacks of arbitrary and capricious judicial make-believe.

Because of the fundamental legal errors made by the Eighth Circuit, the importance of this case and the direct contradictions between the two Eighth Circuit opinions and this Court's opinions in *Frady* and *Engle*, petitioner requests that this Court issue a writ of certiorari. Recently, this Court in *Frady* and *Engle* more clearly defined the definitions of "cause" and "actual prejudice" found in *Francis* and *Wainwright;* in this case this Court has the opportunity to correct the contradictions between the two Eghth Circuit opinions sought to be reviewed here and this Court's opinions in *Frady* and *Wainwright* and in so doing narrow the extraordinarily broad meaning of those terms utilized by the Eighth Circuit. Indeed, the Eighth Circuit's definition of "cause" and "actual prejudice" is so nebulous and so broad that the *Francis* and *Wainwright* test is made virtually irrelevant.

Even assuming, for the sake of argument only, that Thompson has met his "cause" and "actual prejudice" test, petitioner Missouri requests that this Court issue a writ of certiorari to the Eighth Circuit because the jury selection procedure employed in this case was not illegal.

The Eighth Circuit opinion at issue here is fascinating in that it never reaches the issues of whether the jury was illegally and unconstitutionally composed. While the Eighth Circuit came to the conclusion that Thompson had met the *Francis* v. *Henderson* test and thus could raise in the federal judiciary the issue of whether the jury was unconstitutionally composed, the Eighth Circuit never reached nor discussed that issue. First, the Eighth Circuit concluded that there was cause for Thompson's failure to contemporaneously object in 1966 to the jury composition process. Then, the Eighth Circuit found that "actual prejudice" existed in connection with the jury selection process because the sheriff selected the veniremen. The Eighth Circuit assumed that because it found "actual prejudice" the conviction should be overturned. However, the Eighth Circuit never discussed nor reached the crucial issue, which is whether, in fact, the jury selection process was unconstitutional. It is unusual that the Eighth Circuit reversed Thompson's conviction without discussing whether or not the jury was actually illegally and unconstitutionally composed. If for no other reason than this, the Eighth Circuit opinion cannot stand because although it found, that "cause" and "actual prejudice" existed sufficient for the federal judiciary to take cognizance of the jury selection issue, it never found that the jury selection process was unconstitutional.

The sole evidence adduced anent the jury selection process is a one page "Stipulation" filed by the parties in the District Court on or about October 10, 1930. That Stipulation states:

> It is hereby stipulated and agreed between the parties that if W. S. Simmons of Charleston, Missouri, would testify his testimony would be as follows:

1. That W. S. Simmons was a duly-elected sheriff of the County of Mississippi, State of Missouri, during the month of December 1966.

2. That during the month of December 1966, the judge of the Circuit Court of Mississippi County, State of Missouri, entered a special venire facias directing Sheriff Simmons to summon approximately 72 citizens of Mississippi County for jury service on December 20, 1966, for the trial of petitioner herein, Douglas Wayne Thompson.

3. That in the process of executing this special venire facias Sheriff Simmons in his office sat down and made out summonses for various individuals to be served upon said individuals to satisfy this special venire facias.

4. That Sheriff Simmons did not use the Mississippi County Master Jury List in picking these names but simply chose people that he knew and that he thought would make good jurors.

5. Sheriff Simmons will testify that the only criteria he used was that he chose people that he thought would answer questions truthfully on voir dire examination and who were at least twenty-one years old with no criminal convictions.

6. Sheriff Simmons will testify that he chose approximately seven black individuals.

7. Sheriff Simmons will testify that he knew the character of the case, it being a case transferred on change of venue from Cape Girardeau County wherein the Defendant was charged with the murder of a police officer.

The State law in this regard is found in § 494.290, RSMo 1959:

> Courts having civil and criminal jurisdiction shall have power, whenever the grand or petit jury shall have been discharged, and it shall become necessary to have another jury, to order and require the sheriff, or other proper office at the same term or session of said court or at any adjourned or special term of such court, to summon from the citizens of the county having the requisite qualifications for jurors, a new panel of petit or grand jurors, and to order the sheriff or other proper officer to summon a standing petit jury whenever the Board of Jury Commissioners shall have failed to select such a petit jury; whenever a greater number of petit jurors are required than the regular panel, or in case any juror shall fail to attend at the term required, the court may order the sheriff or other proper officer to summon a sufficient number of jurors as the occasion may require.

In order for Thompson to prevail in his claim that the jury was unconstitutionally composed, he must sustain his burden of proving purposeful discrimination. This burden has recently been reinstated by this Court in *Duren* v. *Missouri*, 439 U.S. 357, 58 L.Ed.2d 579, 586-587, 99 S.Ct. 664 (1979):

> In order to establish a *prima facie* violation of the fair-cross-section requirement that defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due

to systematic exclusion of the group and the jury-selection process.

Thompson has not met the three part conjunctive test stated by this Court in Duren. Thompson has been unable to show, either by figures and statistics, or by the testimony of Mr. James Herd, that any "distinctive" group in the community was excluded from either the venire or the petit jury. Similarly, Thompson has not shown that any "distinctive" group was not represented in a fair and reasonable relation to the number of such persons in the community. Finally, there is absolutely no evidence in the record to show that W. S. Simmons engaged in the systematic exclusion of any particular "distinctive" group in the jury selection process. There is nothing per se unconstitutional about the "key man" system. *Carter* v. *Jury Commission*, 396 U.S. 320, 331-337 (1970). It is only when that system is coupled with a sufficient indication of actual discrimination that a *prima facie* case of an unconstitutional selection procedure has been made. In the circumstances of this case Thompson has failed to show any purposeful discrimination of any group, or that the jury was somehow biased against him. As stated by the Court in *Shrader* v. *Riddle*, 401 F.Supp. 1345, 1349 (1975):

> The Constitution doesn't [sic] speak to the manner a state chooses in compiling its jury lists. It merely implies that the petit jury must be selected from a representative cross-section of the community. *Smith* v. *Texas*, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed 84 (1940)....
>
> • • •
>
> ...[M]any states leave the discretion of choosing a jury list in a single individual's hands and absent any intentional exclusion of one segment of the com-

munity by this individual, the procedure is considered a fair one. *Fay* v. *New York*, 332 U.S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043 (1947).

Petitioner agrees with the "Report and Recommendation" of the United States Magistrate Noce [App. B] that Thompson has failed to establish that the 1966 jury selection process was unconstitutional.

While the method employed in this case for the selection of the venire may not have been the best system available, it remains constitutional until Thompson carries his burden and establishes that the process used excluded in identifiable group or otherwise results in an under representation of a "distinctive" group in the community. This burden Thompson has failed to sustain.

As established earlier, § 494.290, RSMo 1959, permitted just a type of venire selection process that was utilized in this case. Assuming, arguendo, that the selection process employed by W. S. Simmons violated State law, that does not amount to federal constitutional error unless there is a showing of exclusion of an identifiable group. See *Cobbs* v. *Robinson*, 528 F.2d 1331, 1341-1342 (2nd Cir. 1975), *cert. denied* 424 U.S. 947 (1976), and cases cited here. Such a showing has not been made by Thompson.

In summary, on this point, Petitioner believes that the Eighth Circuit failed to carry out its duty and determine not only whether Thompson could raise the jury selection issue, but if it concluded that he could, whether that jury selection process was valid. As noted, the Eighth Circuit only reached the question of whether the *Francis* v. *Henderson* test was met; the Eighth Circuit never discussed whether the jury selection process was, in fact, unconstitutional. Certainly, it is not enough to find that

an issue is cognizable in a Federal Court, in order for a writ of habeas corpus to issue a Federal Court must find some error of constitutional magnitude sufficient to justify a requirement that the State either retry or free a particular inmate.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 81-1092

Douglas W. Thompson, *Appellant*, v. Carl White, Superintendent, Missouri Training Center for Men. *Appellee.*	Appeal from the United States District Court for the Eastern District of Missouri

Submitted: July 23, 1981

Filed: October 14, 1981

Before LAY, Chief Judge, STEPHENSON and McMILLIAN, Circuit Judges.

STEPHENSON, Circuit Judge.

Douglas W. Thompson, a Missouri state prisoner, appeals from the district court's[1] denial of his habeas corpus petition filed under 28 U.S.C. § 2254. He contends that he was denied a fair trial because of the jury selection technique used in his 1966 conviction by a Mississippi County,

[1]The Honorable Edward L. Filippine, United States District Judge, Eastern District of Missouri.

Missouri, court.[2] We reverse the judgment of the district court and remand for a new trial.

In 1961, Thompson was convicted and sentenced to death for the March 10, 1961, shooting death of a Cape Girardeau, Missouri, policeman.[3] After an unsuccessful direct appeal of his conviction, *State* v. *Thompson*, 363 S.W.2d 711 (Mo. En Banc 1963) (Thompson I), Thompson's family secured counsel and succeeded in obtaining a new trial through a rule 27.26, Mo. Rev. Stat. petition based on the state's suppression of material evidence. *State* v. *Thompson*, 396 S.W.2d 697 (Mo. En Banc 1965) (Thompson II).

A new trial was held in 1966, in Mississippi County, Missouri. Thompson was again convicted in December 1966, but this time was sentenced to a life term. There was no direct appeal of this conviction.

On September 10, 1975, Thompson filed for relief in the Missouri state court under rule 27.26, Mo. Rev. Stat. In this motion he alleged that (1) he was convicted on the basis of false and perjured testimony and the remaining evidence was not sufficient to sustain a conviction; (2) he was convicted in violation of double jeopardy; (3) the Missouri County jury was unconstitutionally selected; (4) the jury was improperly instructed on the law of the case; and (5) the trial court refused to provide him with a copy of the jury instructions.

The motion was denied on June 22, 1977, without a hearing. The Missouri Court of Appeals affirmed on all

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[2]Petitioner was paroled from the life sentence from which he now appeals. He was sent to California to serve a prior California sentence. California has since vacated his sentence and he is now free.

[3]Sammy Tucker, a fellow defendant, was also convicted and sentenced to death for the death of another policeman arising out of the same incident. Tucker was executed.

issues except that concerning the jury selection. This issue was remanded for an evidentiary hearing. *Thompson* v. *State,* 576 S.W.2d 541 (Mo.App. 1978) (Thompson III).[4]

On October 21, 1977, before the state trial court had ruled on the remanded issue of jury selection, Thompson filed the instant petition for federal habeas relief. In it he renewed his claims concerning the use of perjured testimony, the lack of credible evidence, double jeopardy violations, and improper jury selection. The district court dismissed the petition for failure to exhaust state remedies. Our court affirmed the dismissal of the jury selection claim for failure to exhaust, *Thompson* v. *White,* 591 F.2d 441, 443 (8th Cir. 1979), but reversed and remanded the other issues in light of the Missouri Court of Appeals opinion in *Thompson* v. *State, supra,* 576 S.W.2d 541, which was renderd after the federal district court's opinion and which dealt with those issues.

On February 26, 1979, Thompson filed an amended federal habeas petition restating his claim concerning the use of perjured testimony, lack of credible evidence and double jeopardy violations. On March 10, 1980, before the district court rendered an opinion on this petition, Thompson moved for removal of the jury selection issue from the state court to the federal district court on the grounds that the state had deliberately stalled and delayed the

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[4]The court ruled that defendant deliberately, voluntarily and knowledgeably bypassed his right of direct appeal in order to avoid the possibility of the death penalty. The court ruled that this bypass disposed of Thompson's allegations of instructional error and of the failure to provide him with a copy of the instructions. The court ruled that because the allegation of the use of perjured testimony was identical to the allegation before the Missouri Supreme Court in 1965, it was precluded by that ruling. The court held the claim of insufficient evidence was not cognizable in a rule 27.26 proceeding. The court overruled the double jeopardy claim on the basis of the trial record.

progress of the case. Thompson argued that it was no longer necessary to pursue a remedy in the state court because of this stalling and delay in light of our holding in *Mucie* v. *Missouri State Department of Corrections*, 543 F.2d 633 (8th Cir. 1976).

On October 14, 1980, the parties filed a stipulation in the federal habeas action now before us stating that the sheriff of Mississippi County would testify that he personally selected the jury panel. The stipulation stated that in December 1966, the Mississippi County circuit judge issued a special venire facias directing Sheriff Simmons to summon approximately seventy-two citizens for jury service on December 20, 1966, for the trial of Thompson. Sheriff Simmons personally selected potential jurors on the basis of people he knew whom "he thought would make good jurors," would answer the voir dire examination "truthfully" and were at least twenty-one years old with no criminal convictions. Simmons also knew that the defendant was charged with the murder of a police officer. The stipulation recited the fact that Simmons would testify he chose approximately seven blacks as prospective jurors.

As previously indicated, petitioner was found guilty by the jury and received the sentence of life imprisonment attacked in these proceedings.

The district court, after considering the magistrate's report and recommendation, dismissed all the claims for relief. The court dismissed the jury claim on the grounds that a prima facie case of discrimination was not established by proof that the court failed to use a random jury selection procedure. The court held that a prima facie case is established only when a lack of a random jury selection exists in conjunction with an indication or actual discrimination through exclusion of an identifiable group. The court

also dismissed the claim on the grounds that the underrepresentation of blacks was not sufficient to establish a prima facie case of discrimination.

The sole issue before us is whether the district court erred in its dismissal of the jury selection issue.

The state argues that we are precluded from reviewing the jury selection claim because of Thompson's failure to object at the time of his trial. Thompson responds that he was unaware of the standards concerning the selection of jurors because, at that time, the cases enunciating the standards had not yet been decided. Also, Thompson claims that it was unknown to all the parties that the sheriff had deviated from the statutory random selection procedure.[5] In fact, it was not until counsel was appointed by the federal district court in the instant case that the parties discovered the problem and entered into the stipulation which reveals that the entire jury panel was selected by the sheriff.

The bar of a state contemporaneous rule is not absolute. Under the rule enunciated by the Supreme Court, such a bar can be lifted if adequate cause for the failure to object exists and prejudice to the defendant can be shown. *Wainwright* v. *Sykes*, 433 U.S. 72, 80-91 (1977); *Francis* v. *Henderson*, 425 U.S. 536, 542 (1976).

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[5]The Missouri code outlines the procedure for the selection of juries. It states that the clerk of the circuit court and the judges of the county court constitute a board of jury commissioners for designated counties. Mo. Rev. Stat. § 494.230. The board selects four hundred names of qualified persons. The names of these persons are put on separate slips of paper and "placed in a box with a sliding lid * * * and thoroughly mixed." *Id.* at section 494.240.

The code then calls for the clerk of the board "so situated as to be unable to see the names on such slips" to publicly draw the names of the jurors. *Id.* at section 494.250. If a jury is discharged and it is necessary to have another jury during that term, the court may order the sheriff to summon qualified citizens to serve as the jury panel from which a jury may be selected. *Id.* at section 494.240.

In the present case both factors are satisfied. In light of the fact that Thompson did not know nor had reason to suspect that the statutory procedure was not being followed, he certainly had "cause" not to object. We also recognize that the "grizzly choice" between life imprisonment and execution facing Thompson provided him with an additional incentive not to appeal. *See Fay* v. *Noia*, 372 U.S. 391, 439-40 (1963). As will be discussed at length later in the opinion, we also find that prejudice existed because the sheriff personally selected the veniremen for the trial of an individual accused of killing another law enforcement officer.[6]

Turning to the issue of whether the jury selection entitled the defendant to relief, we are faced with two recent opinions of our court on this subject. In *Henson* v. *Wyrick*, 634 F.2d 1080 (1980), *cert. denied*, 101 S.Ct. 1417 (1981), we held there was prejudice where the sheriff who was in charge of the investigation which led to the arrest of the defendant selected the jurors to fill vacancies on the panel. *Henson* provided an excellent discussion of

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[6]We recognize that the state trial court has not yet dealt with the jury selection question which we refused to consider in 1979, on the basis that Thompson had not exhausted his state remedies. *Thompson* v. *White*, 591 F.2d 441, 443 (8th Cir. 1979). We hold that exhaustion no longer calls for our abstention. Exhaustion is a rule of comity. *Fay* v. *Noia*, 372 U.S. 391, 415-26 (1963). All that we require is that a state be given "one full and fair opportunity to decide a question * * *." *Eaton* v. *Wyrick*, 528 F.2d 477, 480 (8th Cir. 1975). We do not require a petitioner to pursue relief by filing repetitious or futile applications, *Rodgers* v. *Wyrick*, 621 F.2d 921, 924 (8th Cir. 1980), or where the state has unduly delayed the proceedings. *Mucie* v. *Missouri State Dept. of Corrections*, 543 F.2d 633, 635-36 (8th Cir. 1976).

In light of the delays by the state, ample opportunity has been afforded the state to deal with his case and we see no reason to continue to force defendant to pursue a remedy in state court. *Id. See Thompson* v. *White*, *supra*, 591 F.2d at 443.

the polices that bore on our decision to find undue prejudice.[7]

Subsequent to *Henson*, in *Holt* v. *Wyrick*, 649 F.2d 543, 546 (1981), we found that the selection of supplemental jurors by a sheriff in a neighboring county was not prejudicial. We distinguished *Henson* on the grounds that the

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[7]In *Henson* we held:

> This court's statements in *Ross* [*Ross* v. *Wyrick*, 581 F.2d 172 (8th Cir. 1978)] about the potential for officers to abuse their discretion in selecting jurors echoed the long-standing concerns of other federal courts.
>
> • • •
>
> Congressional concern for fundamental fairness in the method of selecting bystander jurors has caused federal selection methods to evolve from one of marshals selecting bystanders from persons present in the court to a method of random selection from specified lists in a manner ordered by the court. This legislative change was prompted in large part by congressional desires to eliminate "subjective screening" of potential jurors.
>
> Furthermore, many state courts have also expressed concern over the unbridled discretion of officials in the selection of bystander jurors.

Henson v. *Wyrick*, 634 F.2d 1080, 1082-83 (8th Cir. 1980), *cert. denied*, 101 S.Ct. 1417 (1981) (citations and footnotes omitted).
We concluded:

> The constitutional defect in Henson's jury is that the sheriff hand-picked his acquaintances to complete the venire panel. That some jurors were acquaintances of the sheriff would not itself invalidate the conviction. Also, that the court allowed some discretion in the selection of jurors would not invalidate the conviction. In this case, however, the sheriff exercised his discretion to ensure that only his acquaintances would fill venire panel vacancies.
>
> The potential for a conviction prone jury under such a system is substantial. Although perhaps not directly involved in the investigation of Henson's crime, the sheriff was the immediate supervisor of the deputies in charge of the case. Regardless whether the sheriff had spoken with his deputies about the case or had formed an opinion as to Henson's guilt before the trial, there is a great potential for the sheriff to hand-pick jurors sympathetic to the prosecution. Where, as here, the jurors are picked according to the sheriff's subjective rather than objective criteria, the oppor-

(*Continued on next page*)

sheriff who conducted the investigation did not choose the jurors.[8]

Our present case is much closer to *Henson* than *Holt*. While we have a sheriff, other than the one who investigated the shooting, selecting the jurors, we have two other extremely prejudicial factors. First, the victim of the shooting was a law enforcement officer. The sympathy that the sheriff would feel for a fellow officer and his family would provide "great potential for the sheriff to hand-pick jurors

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Footnote continued

tunity for the sheriff to express his allegiance to the prosecution by selecting sympathetic jurors is unlimited. In such situations, there is considerable risk that the bystander jurors will mirror the sheriff's own biases.

• • •

We conclude that Henson was denied due process and a trial by a fair jury.

• • •

[F]undamental fairness to the defendant requires some method better designed to obtain an impartial jury than the sheriff hand-picking among his acquaintances.

Id. at 1084-85 (citations omitted).

[8]We held in *Holt*:

This court's decision in *Henson* v. *Wyrick*, *supra*, likewise does not require reversal. In that case, the sheriff, whose subordinates investigated the crime and made the arrest, hand-picked the additional jurors from among his acquaintances. We granted habeas corpus relief because there existed the danger of a "conviction-prone" jury because of the "great potential for the sheriff to hand-pick jurors sympathetic to the prosecution."

In this case, however, the facts differ significantly from those in *Henson*. First, the sheriff's office in neighboring Pemiscot County, rather than the New Madrid County sheriff's office, conducted the investigation. • • • Equally important, Holt presented no evidence that the sheriff selected only his acquaintances for the jury.

Although we express concern with the fundamental fairness in this method of selecting bystander jurors, the record in this case discloses no basis for inferring a deprivation of due process. Accordingly, we reject Holt's contention.

Holt v. *Wyrick*, 649 F.2d 543, 546 (8th Cir. 1981).

sympathetic to the prosecution." *See Henson* v. *Wyrick, supra,* 634 F.2d at 1084. Second, the sheriff selected the entire jury panel. Unlike *Henson* or *Holt* which involved the selection of supplemental jurors, we are faced with the possibility that the entire panel would be unduly "sympathetic to the prosecution." As in *Henson,* the danger of a "conviction-prone" jury in such a situation is simply too great. The prejudice that exists in this case requires a vacation of Thompson's conviction.

We see no need to consider Thompson's other alleged bases for a new trial.

We reverse the denial of the petition for writ of habeas corpus. The conviction should be vacated and we remand for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1092

Douglas W. Thompson, *Appellant*, v. Carl White, Superintendent, Missouri Training Center for Men, *Appellee*.	Appeal from the United States District Court for the Eastern District of Missouri

Submitted: July 23, 1981

Filed: June 4, 1982

Before LAY, Chief Judge, STEPHENSON* and McMILLIAN, Circuit Judges.

PER CURIAM.

Douglas W. Thompson, a Missouri state prisoner, appealed the district court's denial of his habeas corpus petition filed under 28 U.S.C. § 2254. He contended that he was denied a fair trial because of the jury selection tech-

*The Honorable Roy L. Stephenson assumed the status of Senior United States Circuit Judge effective April 1, 1982.

nique used in his 1966 conviction by a Mississippi County, Missouri, court. Upon review, we reversed the judgment of the district court and remanded the case for a new trial. *Thompson* v. *White*, 661 F.2d 103 (8th Cir. 1981). The state appealed. The Supreme Court granted certiorari, vacated the judgment, and remanded the case to us for further consideration in light of *United States v. Frady*, 50 U.S.L.W. 4388 (1982). After reconsidering the case, we again reverse the judgment of the district court and remand for a new trial.

For a statement of the facts in this case see our earlier discussion. *Thompson* v. *White*, *supra*, 661 F.2d 103, 104-05.

In our original opinion we held that the Missouri contemporaneous objection rule did not bar Thompson from attacking the jury selection procedure used in his retrial, even though he failed to object to the jury selection procedure, because he demonstrated adequate cause for his failure to object and prejudice to him was shown. *Id.* at 105-07.

The Supreme Court held that the use of a "plain error" standard in reviewing a defendant's failure to object to a trial procedure in a collateral review of the original trial pursuant to 28 U.S.C. § 2255 was erroneous. The Court stated that the proper standard was the "cause and actual prejudice' standard. *United States v. Frady*, *supra*, 50 U.S.L.W. at 4392. The Court said:

> We believe the proper standard for review of Frady's motion is the "cause and actual prejudice" standard enunciated in *Davis* v. *United States*, 411 U.S. 233 (1973), and later confirmed and extended in *Francis* v. *Henderson*, 425 U.S. 536 (1976), and *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). Under this stand-

> ard, to obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show both (1) "cause" excusing his double procedural default, and (2) "actual prejudice" resulting from the errors of which he complains.

Id.

After re-examining the case, we hold that the facts in this case satisfy the Supreme Court's "cause" and "actual prejudice" standard. Because Thompson "did not know nor had reason to suspect that the statutory procedure was not being followed, he certainly had cause not to object." We also reaffirm our earlier holding that the "grissly choice" Thompson faced "between life imprisonment and excution facing Thompson provided him with an additional incentive not to appeal. *See Fay v. Noia,* 372 U.S. 391, 439-40 (1963)."

Turning to the element of "actual prejudice," we are satisfied that under the facts of the case "actual prejudice," existed. We reach our holding in light of the facts that the selection of the jury to hear the case of the murder of a police officer was by a fellow law enforcement officer and that the sheriff selected the entire jury panel. The parties stipulated "Sheriff Simmons personally selected potential jurors on the basis of people he knew whom 'he thought would make good jurors.'" *Thompson* v. *White, supra,* 661 F.2d at 105-07.

By placing such a person in charge of selecting the jury, defendant was deprived of due process. As an example of the prejudice that must be shown to satisfy the "actual prejudice standard," the Supreme Court in *Frady* referred to *Henderson* v. *Kibbs,* 431 U.S. 145, 154 (1977),

wherein the Court held that in a collateral attack of a conviction pursuant to 28 U.S.C. § 2254, the contested jury instruction must have "so infected the entire trial that the resulting conviction violates due process." (citations omitted) *United States v. Frady, supra,* 50 U.S.L.W. at 4392.

As we have said previously in this case, "[t]he potential for a conviction prone jury under such a system is substantial. * * * [F]undamental fairness to the defendant requires some method better designed to obtain an impartial jury than the sheriff hand-picking among his acquaintances." (citations omitted) *Thompson v. White, supra,* 661 F.2d at 106 n.7 (quoting *Henson v. Wyrick,* 634 F.2d 1080, 1082-83 (8th Cir. 1980), *cert. denied,* 450 U.S. 958 (1981). Clearly, the taint inflicted on the proceeding by the use of this jury selection technique satisfies the Supreme Court's "actual prejudice" test as outlined in *Frady.*

We reverse the denial of the petition for writ of habeas corpus. The conviction is vacated and we remand for further proceedings, consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DOUGLAS W. THOMPSON, *Petitioner,* v. CARL WHITE, Superintendent, Missouri Training Center for Men, *Respondent.*	No. 77-1122 C (3)

ORDER

This matter is before the Court on the petition of Douglas W. Thompson for a writ of habeas corpus.

After consideration of the United States Magistrate's Report and Recommendation, and petitioner's objections thereto,

IT IS HEREBY ORDERED that the Report and Recommendation of the United States Magistrate be and is SUSTAINED and ADOPTED.

IT IS FURTHER ORDERED that the petition of Douglas W. Thompson for a writ of habeas corpus be and is DENIED and DISMISSED.

Dated this 14th day of January, 1981.

Edward L. Filippine
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DOUGLAS W. THOMPSON,
Petitioner,

v.

CARL WHITE, Superintendent,
Missouri Training Center
for Men,
Respondent.

No. 77-1122
C(3)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

The petition of Douglas W. Thompson for a writ of habeas corpus under 28 U.S.C. § 2254 was referred to the undersigned United States Magistrate for initial review and a recommended disposition. 28 U.S.C. § 636(b); Rules 4 and 10, Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254.

Petitioner Thompson, a Missouri State prisoner, commenced this habeas action alleging that his 1966 conviction in Mississippi County, Missouri for the murder of a peace officer is constitutionally infirm. He was originally convicted of the same offense in the Circuit Court of Bollinger County[1] in 1961 and sentenced to death. The conviction and sentence was affirmed on direct appeal. *State of Missouri* v. *Thompson*, 363 S.W.2d 711 (Mo. en banc 1963) (*Thompson* I).

[1]As shown below, the killing occurred in Cape Girardeau County, but the case was transferred to Bollinger County on a change of venue.

In 1964 Thompson filed a motion for post-conviction relief under Missouri Supreme Court Rule 27.26. Ultimately the Missouri Supreme Court vacated the sentence and conviction on the ground that the state had suppressed material evidence, *i.e.* cartridge cases found at the scene of the shooting and in the petitioner's automobile. *State of Missouri* v. *Thompson*, 396 S.W.2d 697 (Mo. en banc 1965) (*Thompson* II). Thompson was retried in 1966, convicted, and sentenced to life imprisonment. No appeal was filed.

On September 10, 1975, Thompson filed another motion for relief from the 1966 conviction under Rule 27.26. In this motion he alleged that (1) his conviction was obtained by the deliberate use of false and perjured testimony, which allegation included the argument that he was not convicted upon substantial or sufficient evidence; (2) his conviction violated the prohibition against double jeopardy; (3) the jury was unconstitutionally selected; (4) the jury was improperly instructed on the law of the case; and (5) the trial court refused to provide him with a copy of the jury instructions. The motion, and its subsequent amendment, were not ruled until June 22, 1977 when relief was denied without a hearing. The Missouri Court of Appeals affirmed the denial of relief on all issues, except the issue of whether the jury was unconstitutionally selected. This issue was remanded for an evidentiary hearing. *Thompson* v. *State of Missouri*, 576 S.W.2d 541 (Mo.App. 1978) (*Thompson* III). In so ruling, the appellate court determined from the record that petitioner's failure to appeal the 1966 conviction was a deliberate, voluntary, and knowledgeable bypass of his right to appeal in order to avoid the possibility of the death penalty after yet another trial. Such bypass, the court ruled, disposed of petitioner's allegations of instructional error and of the failure

to provide him with a copy of the instructions. 576 S.W.2d *at* 547, 548. The Court ruled the remaining contentions on grounds other than procedural bypass. The Court determined that Thompson's allegation of the knowing use of perjured testimony was factually identical to the allegation treated by the Missouri Supreme Court in 1965 and that it was precluded by that earlier ruling. *Id. at* 548. The Court ruled that the claim of insufficient evidence was not cognizable under Rule 27.26. *Id., at* 549. And the Court overruled the double jeopardy claim upon the trial record. *Id.*

On October 21, 1977, Thompson filed the instant petition for federal habeas relief. In this petition he alleged (1) that the prosecution knowingly used perjured testimony against him in the 1966 trial, (2) that the conviction was not supported by credible evidence, (3) that the conviction violated the prohibition against double jeopardy, (4) that the jury was improperly drawn, and (5) that newly discovered evidence established his innocence. *Thompson* v. *White*, 591 F.2d 441, 443 (8th Cir. 1979) (*Thompson* IV). The District Court dismissed the petition for failure to exhaust available state court remedies. The Court of Appeals affirmed the dismissal of the claim that the jury was unconstitutionally selected, but reversed as to the other grounds for relief. *Id.*

On February 26, 1979, Thompson filed an amended federal habeas petition restating his claims: (1) that he had been denied due process because the prosecution knowingly obtained his conviction by the use of false and perjured testimony on the part of Police Officers Robert Ross, Hugo Lang, and Shannon Kelley; (2) that the state's evidence was totally devoid of evidentiary value in that it violated the physical laws of nature and was based upon fabrication and perjury; and (3) that the conviction vio-

lated a prohibition against double jeopardy because the prosecution engaged in bad faith conduct to convict him by any means. On May 1, 1979, respondent asserted certain procedural defenses to petitioner's claims, including the deliberate bypass of state court remedies (by petitioner's failure to appeal the 1966 conviction) and the concurrent sentence doctrine.[2]

Following the referral of this action to the undersigned United States Magistrate for review, the undersigned ordered the production of the transcript of the 1966 trial. Except for pre-trial matters, the trial record had never been transcribed. Respondent submitted the transcript on December 6, 1979.

On March 10, 1980 Thompson moved for the removal of the jury selection issue from the state courts to the federal district court and on March 6, 1980 he requested an evidentiary hearing in this court on all pending issues, including the jury selection issue. On May 21, 1980 this motion was granted and evidence was received on July 16 and 26, 1980. On October 14, 1980, a written stipulation of fact was filed by the parties on the jury selection issue.

I. *Respondent's Procedural Defenses.*

Respondent has asserted that petitioner's claims to habeas relief should not be considered on their merits because (1) petitioner by-passed his state court appeal following the 1966 conviction, (2) he delayed for nine years his collateral attack upon this conviction to the respondent's prejudice, and (3) he is currently serving a life sentence on an independent murder conviction.

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[2]Thompson was convicted in Butler County of an unrelated murder in 1961.

(1) *Intentional bypass.*

Respondent argues that the principles of comity and federalism require that this Court not consider petitioner's claims because he waived his right to appeal his 1966 conviction to the Missouri appellate courts.

After considering the evidence adduced on this issue, including the testimony of petitioner and of his retained counsel in the 1966 trial, the undersigned finds that petitioner did voluntarily and knowingly waive his right to appeal the 1966 conviction and sentence. Immediately after the jury verdict was renderd the court indicated it would proceed to sentence petitioner. Defense counsel conferred with petitioner, his father, and an attorney who was assisting the defense counsel. Their concern was that the court would reimpose the death penalty. Petitioner authorized his defense counsel to inform the court that, if the death penalty was not imposed, petitioner would not appeal. The court rejected this offer and imposed a life sentence. Petitioner then was resolved not to file a motion for a new trial, knowing this was tantamount to waiving his right to appeal. Petitioner's motivation was to avoid the possibility of a death penalty upon retrial, if this conviction was overturned, and to avoid putting his family to further expense in continued defense efforts. At no time did defense counsel advice petitioner that, if he did not appeal the conviction, he would receive a life sentence. Defense counsel also never advised petitioner that if he did not appeal, the charge of murdering Officer Crittendon[3] would be dismissed. This charge had already been dismissed prior to the 1966 trial. *See* Transcript of testimony of James B. Herd, filed August 11, 1980, pp. 31-43, 54-56, 60, 72-74.

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[3]The 1966 conviction was for the murder of Officer Goss. Another officer, Donald Crittendon, was also killed in the incident. Co-defendant Sammy Aire Tucker was convicted on Crittendon's murder and executed.

The general principle asserted by respondent is that a federal court will decline to rule on a question of federal constitutional law arising out of a state conviction where the state court declined to decide the question because it was not presented in accordance with the applicable state court procedures. *Wainwright* v. *Sykes*, 433 U.S. 72, 81-82 (1977); *Fay* v. *Noia*, 372 U.S. 291 (1963); *Francis* v. *Henderson*, 425 U.S. 536 (1976). The only claims to which this principle applies in this case are the allegations that the trial court incorrectly instructed the jury and refused to give petitioner a copy of the jury instructions. In *Thompson* III the Missouri Court of Appeals declined to review only these claims because of petitioner's failure to take a direct appeal. These claims have never been made in this federal habeas action. Petitioner's claims of the knowing use of perjured testimony, insufficient evidence to support the conviction, a violation of the proscription against double jeopardy, and newly discovered evidence of innocence were all considered by the state appellate court and denied on other grounds. *Id., at* 548-49. Therefore, respondent's assertion of deliberate bypass by reason of petitioner's failure to appeal is not a bar to the resolution of the merits of these habeas claims.

The only habeas claim which was not considered on the merits by the Missouri Court of Appeals is the claim of unconstitutional jury selection, which was remanded for an evidentiary hearing. This claim also, respondent argues, should not be determined by this Court on the merits because of the failure of defense counsel to object at trial to the composition of the venireman panel. The Missouri Court of Appeals, in its remand of this issue for a hearing, recognized this fact as possibly dispositive:

> We have the view that challenges to the composition of the petit jury array are subject to the rule of pre-

> clusion by failure to object timely, at least where the information indicating discriminatory selection was available, as a practical matter, at the time of trial.

Thompson II, *supra, at* 549. There are two difficultes with respondent's argument. First, this claim was removed to this Court from the Missouri courts before disposition. Whether the state courts would have refused to entertain the claim on its merits is left to speculation. Second, as the parties have now attested, the procedure used to select the venireman panel for the 1966 trial was other than the usual procedure prescribed by Missouri statutes, by special venire facias summons. *See* § 494.290 RSMo 1959. There is no indication in the record, including the testimony of defense counsel James Herd at the federal habeas hearing, that he knew this procedure was used. He testified that he was unaware of any basis to challenge the venire panel. *See* Transcript of testimony of James B. Herd, filed August 11, 1980, p. 62. Upon this record the Court believes that the bypass doctrine is not properly invoked to prevent a determination of this claim on its merits.

(2) *Nine year delay.*

Respondent argues that because Thompson did not challenge the December 1966 conviction until September 10, 1975, when he filed a motion for post-conviction relief under Missouri Supreme Court Rule 27.26, the state has been prejudiced in its ability to defend against these habeas claims. *See* Rule 9(a), Rules Governing § 2254 Cases in the United States District Courts, 28 U.S.C. following The undersigned disagrees. The Court has

II. *Merits of Petitioners' Claims.*

(1) *Sufficiency of the evidence.*

Thompson's first substantive claim for habeas relief is that the state's evidence was insufficient to sustain his

conviction because it violated the physical laws of nature and was based upon fabrication and perjury. Putting aside until part (2) below, his allegations of fabrication and perjury, the proper standard for determining whether the evidence is sufficient to support a state criminal conviction is

> whether after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Jackson v. *Virginia*, 443 U.S. 307, 319 (1979). The application of this standard does not include a determination of whether or not the jury in Thompson's case *should* have reached a determination of guilt; the court's duty is to determine whether the record contains legally sufficient evidence by which any rational trier could have convicted him. *Id.*, 319-20 n.13.

Thompson was convicted of murder in the first degree in violation of § 559.010 RSMo 1959. The elements of the offense required that the killing be willful, deliberate and premeditated. These elements may be established by circumstantial evidence. *State of Missouri* v. *Thompson*, 363 S.W.2d 711, 741 (Mo. en banc 1963).

See in the light most favorable to the state, the evidence offered during the 1966 trial indicated the following facts: On March 10, 1961, at approximately 9:00 p.m. a suspicious Oldsmobile automobile was observed on a parking lot in Cape Girardeau, Missouri. Police officers in two vehicles pursued the Oldsmobile which was driven by Sammy Aire Tucker, and in which petitioner Thompson was the only passenger. The Oldsmobile was stopped by the police on the east shoulder of Highway 61 heading north from Cape Girardeau. The first police vehicle was driven by Officer Donald Crittendon; Auxiliary Police

Officer Herbert L. Goss and Officer Hugo Lang rode as passengers. Crittendon stopped his vehicle a few feet behind the Oldsmobile. Crittendon exited the police vehicle and walked up to the driver's side of the Oldsmobile and began to question the driver. Officer Goss positioned himself at the right rear of the Oldsmobile and Officer Lang began looking into the left rear window of the Oldsmobile. The second police vehicle was driven by Officer Shannon Kelley; Officer Robert F. Ross rode as a passenger. Kelley drove his vehicle past the Oldsmobile and the first police vehicle on Highway 61, made a u-turn, and proceeded south to a position opposite the highway from the other two vehicles. Tucker, the driver of the Oldsmobile, fatally shot Officer Crittendon in the stomach without warning and began firing at the officers across the road. At the same time Crittendon was shot, shots were heard on the passenger's side of the Oldsmobile. Thompson had been seen standing on the outside of the Oldsmobile on the passenger's side facing Officer Goss. One of the gunshots went through both of Goss's legs near the knees. Goss ultimately died from loss of blood. Thompson was convicted of murdering Goss.

Testimony of Robert Ross.

Robert Ross testified that just before shots were fired he observed Thompson raise up off the front passenger's seat, open the passenger door, and back out of the vehicle. Thompson had his hands down in front of him. Just as the Oldsmobile driver opened his door, Ross saw Thompson pull a weapon from his waistband. Ross then saw two flashes over on the passenger's side of the vehicle. None of the police officers had their weapons drawn at that time. (Tr. 277). Ross next saw Officer Goss laying in the driveway to the rear of the Oldsmobile on his back, with his feet to the west and his head to the east. (Tr. 278).

Tucker then quickley drove the Oldsmobile from the scene with Thompson barely able to reenter the vehicle.

On cross-examination Ross testified that the highway was constructed of concrete and the shoulder of grass and gravel. A drainage ditch was adjacent to the shoulder. The Oldsmobile was stopped in a residential driveway, just off the pavement and parallel to the road. The first police vehicle was stopped just behind the Oldsmobile in the next driveway, also just off the pavement of the highway. The driveways were made of gravel. He remembered that Thompson exited the vehicle before any shots were fired. When Officer Crittendon moved forward to allow the driver to exit the Oldsmobile, Officer Lang was then at the left rear of the Oldsmobile. Thereafter, he did not know where Officer Lang went. Ross testified that when Thompson drew his weapon on the passenger's side of the Oldsmobile, Thompson was standing not more than a step from Officer Goss. (Tr. 289.) Goss was standing two or three steps east of the Oldsmobile facing west. Ross was unable to estimate in feet the distance between Goss and Thompson at the time Goss was shot. Ross testified that he did not know how many shots Officer Kelley fired or whether Officer Lang fired any shots. The only first aid he remembers being administered to Goss, before an ambulance arrived at the scene, was given by a woman who came out of her home with blankets. (Tr. 301.) When shown Defendant's Exhibit C, a photograph depicting Officer Goss as he laid on the ground covered with a blanket and with his head on a pillow, Ross testified that there was no pillow or sheet at the scene when Officer Crittendon was taken to the hospital by Kelley and before the ambulance came to pick up Goss.

On cross-examination Ross further testified that on page 4 of the written statement he gave police he stated

that Officer Goss's wound did not appear serious and, therefore, there was no need for first aid. Later, Officers Ross and Kelley participated in the extensive search for Thompson and Tucker. Ross further testified that he did not see Thompson actually fire his weapon. Rather, he saw a pistol in Thompson's hand, saw Thompson whirl, and point the pistol. The Oldsmobile's seat and doorpost prevented him from seeing the shot being fired. He saw no part of Thompson's forearm. (Tr. 311.) However, he did notice that Thompson's arms were both extended, his right arm was bent at the elbow, and he was standing straight up. (Tr. 313). It appeared that the pistol in Thompson's hand was in "a normal position". (Tr. 314). He testified that the lower portion of Thompson's wrist would have been approximately 41 inches above the ground. (Tr. 314-15.)

On cross-examination Ross further testified that he recalled his March 11, 1961 testimony during the coroner's inquest. He acknowledged that during that interrogation he did not testify that he observed Thompson draw a pistol or have a pistol in his hand. He testified that the coroner did not ask him that question. (Tr. 319). He testified that nowhere in his written statement to the police did he say that he could see Thompson holding a pistol in his hand or see a pistol in Thompson's waistband. Neither did he say in that written statement that he did not see a pistol in Thompson's possession. (Tr. 324.)

Testimony of Hugo Lang.

Hugo Lang testified at the 1966 trial when Officer Crittendon was examining a paper handed him by the driver of the Oldsmobile, Lang was looking into the back of the Oldsmobile through a window. Lang observed the passenger in the front seat in a prone position. He did not see a weapon in the driver's hand, but heard shooting

from his front. Upon hearing the gunfire he went between the Oldsmobile and the patrol car to the right side of the patrol car and drew his firearm. Lang fired two rounds "at the man who was standing aside of the car on the right side of the Oldsmobile." (Tr. 340.) When Lang last saw Goss, Goss was standing out away from the Oldsmobile ten or twelve feet. Lang went to the rear of the patrol car and crossed the highway, firing one round at the Oldsmobile.

On cross-examination Lang was unable to describe the man he fired at on the passenger's side of the Oldsmobile. (Tr. 353). The headlights of the patrol car were on and eluminating this man. (Tr. 356.) Lang testified that he was in a standing position when he fired his first shot from the level of his belt. He fired as quickly as he could get his pistol out of his holster after he heard the original gunshots.

On cross-examination Lang testified that in his coroner's inquest testimony he stated that he saw the Oldsmobile passenger exit the passenger door and clear it by two or three feet, that he heard shots fired and he went down, and that he then fired two rounds at the man on the right hand side. (Tr. 364.) Lang was further questioned about his police report statement that he had completed looking into the back seat of the Oldsmobile and had started in between the two vehicles before Officer Crittendon asked the driver to step out of the automobile. Lang testified that a portion of the police statement did not accurately record what he saw. (Tr. 370-71.) Lang further testified on cross-examination that after the shooting he went back across the road to Officer Goss. Goss was laying on the right side of the patrol car near the front. He examined Goss and covered him with an overcoat. He did not move Goss before the ambulance arrived. Officer Lang examined the photograph of Goss, Defend-

ant's Exhibit C, and identified the blankets and the pillow which he put under Goss's head. He further testified to the statements he gave in his pre-trial deposition: that he never saw a pistol in Thompson's hand and never saw Thompson fire a pistol.

Testimony of the Physicians.

At trial the state offered the testimony of Dr. Edward D. Campbell and Dr. Thomas A. Lovinggood, who examined Officer Goss at the hospital on March 10, 1961. Their testimony indicated that the gunshot penerated Goss's legs, entering the right leg just above the knee, in a slightly downward trajectory, and exiting the left leg just behind the knee. Dr. Campbell estimated that the point of entry was fifteen to eighteen inches above the ground; Dr. Lovinggood estimated approximately twenty inches above the ground. As it passed through Goss's legs for twenty inches, the bullet dropped approximately one inch in a straight line.

Testimony of Shannon Kelley.

Shannon Kelley testified at the trial that he observed Officer Crittendon speaking to the driver of the Oldsmobile and saw Officer Lang shining his light into the back of the vehicle on the driver's side. Crittendon told the driver to step out; the driver did so and shot Crittendon in the stomach without a warning. Almost simultaneously there were shots on the passenger's side of the Oldsmobile and Officer Goss yelled that he was hit. (Tr. 424.) Kelley testified that at the time Crittendon was shot Lang was standing at the left rear of the Oldsmobile. Kelley told Ross to get down and Kelley began firing across the road at the driver of the Oldsmobile hitting him. The Oldsmobile then sped away. Kelley testified that before Officer Goss was shot he was standing at an angle half facing the Oldsmobile and half facing Thompson (Tr. 427).

Kelley testified that none of the officers had their weapons drawn before the shooting began.

Kelley testified further that one or two days after the shooting he and other policemen returned to the scene to reconstruct the incident. At trial he testified to the placement and location of the bullet holes in the vehicles.

On cross-examination Kelley testified that before the shots were fired he observed Goss standing a few feet away from the back side of the passenger's side of the Oldsmobile. Thompson was standing approximately three or four feet from Goss. (Tr. 448.) He did not see either Goss or Thompson change their positions at any time before the shooting began. When questioned about his prior testimony during the trial of Sammy Aire Tucker that Thompson was speaking with Officer Goss, Kelley testified that he did not recollect whether or not Goss and Thompson spoke with one another. (Tr. 450.)

He testified that after Tucker fired his weapon, he heard two shots from the passenger's side of the Oldsmobile. He testified that he did not know exactly what Officer Land did after he shined his light into the rear of the Oldsmobile and the shots were fired. Ultimately, Kelley took Crittendon to the hospital. Kelley could not remember in what position Officer Goss lay on the ground, but testified that he did not recall Officer Goss making any movements after he was hit and before he fell to the ground. Kelley testified that at no time did he see Thompson with a gun in his hand and never saw gunfire flashes from the passenger's side of the vehicle. He did, however, hear gunshots being fired from that side.

Other State's Evidence.

Further testimony offered by the state described the flight and capture of Tucker and Thompson. When Thompson was ultimately captured, a pistol was recovered.

At the conclusion of the state's evidence defense counsel moved for a judgment of acquittal which was overruled.

Defense Evidence.

The defense offered the testimony of Dr. Melvin C. Kasten who examined Officer Goss on March 10 in the hospital emergency room. He recalled that he testified during the preliminary hearing in the Cape Girardeau Magistrate Court that the bullet trajectory was perpendicular to the legs at its entry point.

Ivan E. McLain testified that as a detective sergeant he searched the Oldsmobile and the person of Sammy Tucker. From Tucker's person there was taken a receipt for the purchase of a Walther P-.38 pistol.

Donald A. Kremer, a professional photographer, testified that at about 9:30 p.m. on March 10, 1961, he drove by the scene of the shooting shortly after the incident, sped home for his camera, and quickly returned. As he passed the scene the first time, he observed a person lying near the road who was not covered in any way. When he returned to the scene this person had been covered and a pillow placed under his head. This position was approximately the same as when he first saw the person (Tr. 568). He photographed Officer Goss laying on the ground.

The defense also offered excerpts of the transcript of the testimony of Ross and Lang at the coroner's inquest and excerpts from their police statements.

The defense offered the testimony of Gerald Dreifke, a professor of electrical engineering. He testified at the trial as an engineering expert concerning the distance from which the pistol would have to be held, given the substantially horizontal trajectory of the bullet through Gross's

legs and the nearness of this trajectory to the ground. He testified that the person firing the weapon would have to hold the weapon approximately twenty feet from the person being shot in order to produce the path that the bullet took through Goss's legs. (Tr. 601.) On cross-examination Dr. Dreifke was asked to assume that the gun was held 41 inches above the ground and eight feet from the outside of Goss's right leg. To this hypothetical question he answered that there would be a drop of two and one half inches in the trajectory of the bullet through the legs. If the weapon were held 35 inches above the ground and twelve feet from the outside of Gross's leg, the bullet would drop 1.4 inches. (Tr. 606, 611-12.)

Missouri State Highway Patrolman Kenneth Miller testified as a ballistics expert. He examined the four weapons seized from Tucker and Thompson and the empty cartridges recovered from the scene of the shooting and from the Oldsmobile. It was his opinion that all eight of the expended cartridges were ejected from the Walther P-.38 weapon. (Tr. 627.)

DISCUSSION

Thompson contends that he did not fire the shot that killed Officer Goss and that it was physically impossible for him to do so from their relative positions, as established from the state's evidence. He argues that the evidence indicates that he was standing and that he had a weapon at waist heighth from the ground. It is his contention that Officer Lang mistakenly shot Goss as he was moving around the police vehicle. However, the jury was presented with evidence which indicated that Thompson had alighted from the Oldsmobile on the passenger's side, was near to and facing Officer Goss when Goss was shot, that he had a firearm in his hand at the time of the shooting, that there were gunfire flashes on the passenger's

side of the vehicle, that no officer had drawn his weapon until after the shooting, that he fled from the scene of the shooting, and that he eluded capture for several days. Such circumstances tend to establish Thompson's guilt.

His arguments of witnesses' incredibility and of physical impossibility must be considered in connection with the totality of the circumstances which were presented in evidence to the jury: that the shooting occurred at night and was followed by great excitement and hurried activity, and that no one testified that he saw Goss' position at the precise time he was wounded. At most, the witnesses testified to Goss' location before and after he was shot. The arguments that Thompson makes in this habeas action were presented to the jury, but the jury resolved the issues against him. Upon this record the conclusion is inescapable that a rational trier of fact could have found beyond a reasonable doubt that Thompson murdered Goss.

(2) *Knowing Use of Perjured Testimony*

A criminal defendant is denied due process of law under the Fifth and Fourteenth Amendments by the prosecution's knowing use of false material evidence. *Giglio* v. *United States*, 405 U.S. 150 (1972); *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959); *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935). The prosecutor's knowledge that the evidence is false must be established by petitioner. *United States* v. *Runge*, 593 F.2d 66, 73-4 (8th Cir. 1979). And mere inaccuracies in the evidence are an insufficient basis for relief, *United States* v. *Glover*, 588 F.2d 876, 879 (2nd Cir. 1978).

Thompson alleges that the prosecutor in the 1966 trial knowingly used the false testimony of Police Officers Ross, Lang, and Kelley. He alleges that they lied when testifying to such facts as where Officer Goss stood, where his body lay after he was shot, and Officer Lang's lo-

cation during the shooting. The 1966 trial record indicates that the officers' trial testimony, the coroner's inquest testimony, and the statements to the investigating police contained certain discrepancies. These discrepancies were placed before the jury during the trial. By itself, this evidence does not rise to the level of self-evident perjury that was known to be false by the prosecutor. There is no other evidence in this record that involves the 1966 trial prosecutor in the knowing use of perjured evidence. This ground for relief is without merit.

(3) *Newly Discovered Evidence.*

Thompson alleges that in 1978 he acquired new evidence which indicates that Officers Kelley, Ross and Lang lied at both of his trials. At his hearing on July 16, 1980, petitioner testified that this evidence was (1) a photograph of Officer Goss as he lay wounded on the roadside (Hearing Exhibit No. 1); (2) a copy of a police report, which included a description of the police reenactment of the crime scene (Hearing Exhibit No. 2); and (3) eight photographs of the crime scene as reenacted by police (Hearing Exhibit No. 3). This evidence, he argues, supports his testimony at the initial trial and proves that the police changed their stories. He states as follows concerning the contents of this police report:

> They further agreed, as did an impartial bystander, the later coroner of the county, that the deceased fell to the ground exactly where he stood and was never moved from his falling position until the ambulance came to pick him up and take him to the hospital.
>
> Thus, if the deceased fell and lay on the road edge, head toward the gutter between the cars, then he stood out in the pavement on the driver's side of

the Oldsmobile, or in an area where it was impossible for petitioner to have shot him because the Oldsmobile was between petitioner and deceased. Thus, a look to the contents of the official police investigation report petitioner just acquired last July should clear up the issue of whether petitioner told the truth or the police did. In this report the following is taken verbatim . . . :

> "The cars were located [during the March 21, 1961 reenactment] for photographing according to locations agreed on by Patrolman Shannon Kelley and Auxiliary Hugo Lang. *The relative positions of the cars were also based upon the spot were Goss had fallen. The spot was indicated and can be seen in the developed photographs as a gravel-covered spot between car 2 and the Oldsmobile.*"
>
> Thus, their own police investigation report proves they lied to the jury on the most crucial issue on the case, where the deceased stood and fell. Their testimony, not only was false, it completely destroyed petitioner's truthful testimony at the first trial to such an extent their perjury caused petitioner to forego his constitutional right to testify in his own behalf at the second trial. (Emphasis included.)

(Traverse filed May 15, 1979, page 13.) He argues that this report establishes that the officers told the investigators one thing, then took the stand and testified to contrary facts. (Petitioner's reply filed May 2, 1980, p. 7.)

Petitioner's argument is insufficient in light of the record. What Thompson describes as newly discovered evidence was seen or used by defense counsel during the 1966 trial. The photograph submitted by Thompson in support of the instant petition, which shows Goss laying on

the ground, pillow under his head and covered, does indeed apear to indicate that his feet are on the hard surface of the highway while the rest of his body, from the area of his knees to his head, lay on the shoulder of the road near a graveled area. This photograph was introduced into evidence during the 1966 trial. *See* Transcript of Petitioner's testimony on July 16, 1980, pp. 32-33; Transcript of James B. Herd's testimony on July 26, 1980, p. 47; and Hearing Exhibit No. 1. It also reflects Ross' testimony that Goss lay in the driveway to the rear of the Oldsmobile, head to the east, feet to the west. The eight photographs of the renacted crime scene were used by defense counsel during the 1966 trial. *See* Herd Testimony, p. 50. Although the police report did not come to light until after the trial, *id. at* 48-49, much of the information it contained was used during the trial, *id. at* 49. The arguments made by Thompson in this petition were the same arguments made to the jury by his counsel in his closing summation. Thompson's use of this evidence to support his theory of defense adds nothing to the record which was not presented to the jury. This evidence is not newly discovered and does not establish that the prosecutor knowingly used false evidence. Therefore, such evidence is not a sufficient basis for federal habeas relief. *Townsend* v. *Sain*, 372 U.S. 293, 317 (1963).

(4) *Double Jeopardy.*

Petitioner alleges that his constitutional right not to be placed in jeopardy twice for the same offense was violated because the state prosecutors engaged in bad faith to convict him by any available means.

It is petitioner's contention that the Fifth Amendment prohibition against Double Jeopardy.

> forecoses the State of Missouri from further harrassment of petitioner of successive prosecutions which

would force petitioner to accept the services of court-appointed counsel and not counsel of petitioner's own choosing because the illegal actions complained of herein have completely depleted petitioner's resources or means of retaining a lawyer from out of the Southeast Missouri area that is not under the influence of the law enforcement officials in Cape Girardeau, Missouri.

(Amended Petition filed February 26, 1979.)

The Fifth Amendment's prohibition against placing a criminal defendant twice in jeopardy for the same offense applies to the states through the Fourteenth Amendment. *Benton* v. *Maryland*, 395 U.S. 784, 794 (1969). Following the reversal of his 1961 conviction, petitioner was retried for the same offense. The reason for the retrial was the suppression of evidence by the prosecution. In its reversal the Missouri Supreme Court did not determine that the evidence was insufficient to support the conviction. Under these circumstances there was no acquittal for double jeopardy purposes and the state was empowered to try petitioner again. *United States* v. *Scott*, 437 U.S. 82 (1978); *Sedgwick* v. *Superior Court*, 584 F.2d 1044, 1049-50 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979).

Petitioner's substantive allegations do not state a claim for relief for a violation of double jeopardy. Rather, they are relevant to his other constitutional claims which have been considered and overruled above.

Petitioner's reliance upon Justice Rehnquest's statement in *Divans* v. *California*, 434 U.S. 1303 (1977), that double jeopardy protects a defendant from bad faith on the part of the prosecutor, citing *United States* v. *Jorn*, 400 U.S. 470, 485 (1971), is misplaced. That proposition is drawn from a line of cases involving the granting of a pre-verdict mistrial caused by the acts of a prosecutor.

The strong interest of the defendant in having the trial concluded by a particular tribunal requires that "the prosecutor must demonstrate 'manifest necessity' for any mistrial declared over the objection of the defendant." *Arizona* v. *Washington*, 434 U.S. 497, 505 (1978). Such an interest is not at issue here and the prohibition against double jeopardy is not violated when a criminal conviction is reversed on the defendant's appeal and the charge is retried. *Cf., Green* v. *United States*, 355 U.S. 184, 189 (1957).

Therefore, petitioner's fourth ground for habeas relief is without merit.

(5) *Improper jury selection.*

Petitioner originally alleged that the panel of jury veniremen selected for his trial were not drawn from a cross-section of the community. As the case developed, the allegation has become that the panel was not selected according to the procedures called for by the Missouri statutes and there was discrimination against the selection of blacks.

Petitioner and respondent, by their stipulation filed on October 14, 1980, agreed that the jury panel which tried petitioner in 1966 was personally selected by the Sheriff of Mississippi County. In December 1966 the Circuit Court issued a special venire facias order to the Sheriff to summon seventy-two citizens of Mississippi County for service on petitioner's trial. *See* § 494.290 RSMo 1959. In executing this order the Sheriff prepared and served summonses on persons who were at least twenty-one years old, whom he believed would answer the voir dire questions truthfully, and who had no criminal convictions. The Sheriff did not pick the veniremen's names from the master jury list. This panel of veniremen included seven black

persons. When he selected the jury members, the Sheriff knew that the case involved the killing of a police officer. The jury was not selected according to the random selection process generally provided for in Chapter 494 of the Revised Statutes of Missouri (1959).

It is well established that, although petitioner Thompson is white, he has standing to complain of a jury selection procedure that is racially discriminatory. *Peters* v. *Kiff*, 407 U.S. 493 (1972). His original allegation, that the venireman panel did not reflect a cross-section of the community, does not state a claim for relief. This is so because a criminal defendant is not entitled to a jury that includes persons from the various segments of our society. Rather, he is entitled to a jury from which persons from various groups are not unlawfully excluded. Proper jury selection contemplates

> an impartial jury drawn from a cross-section of the community. . . . This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. (Citation omitted.)

Thiel v. *Southern Pacific Co.*, 328 U.S. 217, 220 (1946). A state court criminal conviction cannot stand if it is based upon a verdict of a petit jury from which black persons were excluded by reason of their race. *Whitus* v. *Georgia*, 385 U.S. 545, 549-50 (1967). It is the petitioner's burden to prove purposeful discrimination. He may do so by a prima facie case of population figures and statistics. If a prima facie case is made, the burden shifts to the prosecution to establish that no purposeful discrimination occurred. *Id., at* 550.

Petitioner has not made out a prima facie case of discriminatory jury selection. No evidence indicated an express discriminatory intent. The facts as stipulated indicate the use of a "key man" selection system in which the Sheriff, without reference to any master list, simply selected 72 persons known by him to make up the venire panel. Such "key man" systems are suspect because of the inherent possibilities for abuse. *Henson* v. *Wyrick*, No. 79-1808, slip op. (8th Cir., November 12, 1980). When the existence of such a system is proved along with figures which indicate a constitutionally significant disparity between the proportion of blacks in the population and the proportion of blacks on the first level of juror selection, a prima facie case of racial discrimination has been made. *Ross* v. *Wyrick*, 581 F.2d 172, 174 (8th Cir. 1974).

Population figures indicate that in 1970 21.16% of the total population of Mississippi County was black. *Ross* v. *Wyrick, supra at* 173. Of the eligible jurors in 1970, 14.5% were black. *Id.* Of the 72 veniremen selected by the Sheriff, 7 or 9.72% were black. Depending on whether the black population or the black eligible jurors are used for comparison, the differences between these percentages and the percentage of blacks represented in the first "jury pool", here the venire panel, are 11.44% (21.16%-9.72%) and 4.78% (14.5%-9.72%). In *Ross* the same comparisons resulted in differences of 17.78% and 11.08%, respectively. *Ross, supra, at* 174. It is the opinion of the undersigned that the differences present here, fall sufficiently short of *Ross* to preclude the finding of a prima facie case of unconstitutional discrimination. In *Swain* v. *Alabama*, 380 U.S. 202 (1965), the jury roll consisted of the subjective selections of moral persons over the age of 21 by three jury commissioners. Venires drawn from this roll were apparently selected at random. The Court held that:

We cannot say that purposeful discrimination based

> on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as 10%. . . . Undoubtedly the selection of prospective jurors was somewhat haphazard and little effort was made to ensure that all groups in the community were fully represented. But an imperfect system is not equivalent to purposeful discrimination based on race. We do not think the burden of proof was carried by petitioner in this case.

Swain, supra at 208-209. The only differences between the procedure followed in the instant case and the procedures followed in *Swain* and in *Ross* are that no master list was employed and the subjective selections were made by a sheriff rather than by a jury commissioner. The record does not indicate any increase in the likelihood of racial discrimination caused by these differences. Finally, there is no indication that the Sheriff was in any way interested in the investigation or prosecution of the case as was the case in *Henson* v. *Wyrick, supra.*

It is the opinion of the undersigned that the basis of petitioner's complaint focuses more on the "key man" system employed here rather than the exclusion of blacks from the venire panel. At the hearing before the undersigned on July 16, 1980, defense counsel testified that while he did not recall using his preemptory challenges to strike blacks from petitioner's jury, he did recall that it was his considered desire not to have any black person on the petit jury. This was because he and local counsel retained to aid in the selection of the jury believed that black jurors in the community would be guided in their voting by the desires of the white jurors. *See* Herd testimony, p. 62-66. While this testimony may not affect the significance of the percent of underrepresentation of blacks on the venire panel, it does support the conclusion that

the gravamen of petitioner's complaint is the "key man" system rather than the exclusion of blacks.

There is, however, nothing *per se* unconstitutional about the "key man" system. *Carter* v. *Jury Commission*, 396 U.S. 320, 331-337 (1970). It is only when that system is coupled with a sufficient indication of actual discrimination that a prima facie case of an unconstitutional selection procedure has been made. *Id.* In the circumstances of this case, it is the opinion of the undersigned that the 11.44% or 4.78% disparity is insufficient to established a prima facie case. *Cf.*, *Trotter* v. *Stephens*, 241 F.Supp. 33, 42-44 (E.D. Ark. 1965).

Petitioner also argues that a prima facie case is made by a showing that state law regarding the use of random jury selection procedures was not followed in the selection of the jury which convicted him. Such a violation, however, does not amount to a federal constitutional error unless there is a showing of exclusion of an identifiable group. *See Cobbs* v. *Robinson*, 528 F.2d 1331, 1341-1342 (2nd Cir. 1975), *cert. denied*, 424 U.S. 947 (1976), and cases cited there. For the same reasons stated above, it is the opinion of the undersigned that there was not a sufficient exclusion to support this claim.

RECOMMENDATION

For the reasons set out above, it is the recommendation of the undersigned United States Magistrate that the petition of Douglas W. Thompson for a writ of habeas corpus be denied without further proceedings. The parties

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[4]The method by which petitioner's venireman panel was selected and summoned is authorized by state law under certain circumstances on which no evidence has been adduced. See § 494.290 RSMo. 1959.

are advised that they have fifteen days within which to file writen objections to this Report and Recommendation.

Respectfully submitted,

David D. Noce
UNITED STATES MAGISTRATE

Date this 17th day of December, 1980.

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

DOUGLAS W. THOMPSON, *Petitioner,* v. CARL WHITE, Superintendent, Missouri Training Center for Men, *Respondent.*	No. 77-1122 C (3)

ORDER

The petition of Douglas W. Thompson for a writ of habeas corpus was denied by this Court on January 14, 1981. On appeal to the United States Court of Appeals for the Eighth Circuit that denial was reversed and the case remanded for a new trial. The State of Missouri appealed that decision and the United States Supreme Court granted certiorari, vacated the judgment, and remanded the case to the Court of Appeals for further consideration in light of *United States* v. *Frady*, 50 U.S.L.W. 4388 (1982). After reconsideration, the Court of Appeals again decided that the petition for writ of habeas corpus should be granted, the conviction of petitioner vacated, and the case remanded for a new trial.

This matter is before the Court pursuant to the mandate of the United States Court of Appeals for the Eighth Circuit filed in this Court on June 4, 1981.

Accordingly,

IT IS HEREBY ORDERED that the petition of Douglas W. Thompson for a writ of habeas corpus be and is GRANTED.

IT IS FURTHER ORDERED that petitioner's conviction by the Circuit Court of Mississippi County, Missouri is VACATED.

IT IS FURTHER ORDERED that unless a new trial is granted to petitioner by the State of Missouri and commenced within sixty (60) days of the date of this order, or within such additional time as may be granted for good cause shown in writing before the expiration of the time stated, petitioner shall be discharged from the subject charge against him and any obligation thereunder.

Dated this 14th day of June, 1982.

Edward L. Filippine
UNITED STATES DISTRICT JUDGE

IN THE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DOUGLAS W. THOMPSON, *Petitioner,* v. CARL WHITE, Superintendent, Missouri Training Center for Men, *Respondent.*	**No. 77-1122 C (3)**

MOTION FOR ADDITIONAL TIME WITHIN WHICH TO COMMENCE PROSECUTION OF PETITIONER

Carl White, Superintendent, Missouri Training Center for Men, respondent herein, by Attorney General John Ashcroft, State of Missouri, respectfully requests, pursuant to the Suggestions which follow, that the State of Missouri be granted additional time within which to commence prosecution of petitioner so that respondent may petition for a writ of certiorari in the United States Supreme Court to review the latest decision of the Eighth Circuit in this case.

SUGGESTIONS

This court issued an opinion in this case on June 14, 1982, in which the pertinent history of this litigation was chronicled. Pursuant to the most recent decision of the Eighth Circuit in this case this court ordered that the petition of Douglas W. Thompson for writ of habeas corpus be granted, that his Mississippi County Circuit Court conviction be vacated, and that a new trial be commenced within sixty days of the date of the order "or within such addi-

tional time as may be granted for good cause shown in writing before the expiration of the time stated. . . ."

On April 26, 1982, the United States Supreme Court granted White's petition for a writ of certiorari and vacated the Eighth Circuit decision in this case dated October 14, 1981, and remanded to Eighth Circuit for further consideration in light of *United States* v. *Frady*, 50 U.S.L.W. 4388 (1982).

Without further briefing or oral argument the Eighth Circuit issued an opinion on June 4, 1982, pursuant to the August 26, 1982, directive of the United States Supreme Court in which the Eighth Circuit again concluded that Thompson's conviction ought to be reversed, even in light of *United States* v. *Frady*.

Respondent White believes that the Eighth Circuit erred in again reversing this court. White believes that the Eighth Circuit has misconstrued the April 26, 1982, directive of the United States Supreme Court and has incorrectly reconsidered the case in light of *United States* v. *Frady*. For this reason White intends to once again seek certiorari in the United States Supreme Court in an effort to have overturned the most recent decision of the Eighth Circuit in this case. Because the Eighth Circuit issued its mandate immediately upon filing its June 4, 1982, opinion, and in light of this court's June 14, 1982, order directing the State of Missouri to retry Thompson within sixty days, White requests that this court stay any further proceedings in this regard until such time as he has filed a petition for a writ of certiorari in the United States Supreme Court and that court has ruled thereon.

Respondent White has ninety days from June 4, 1982, in which to file a petition for a writ of certiorari in the United States Supreme Court. Title 28 U.S.C. Section 2101(c). Therefore, White respectfully requests this court

delay the effectuation of its order dated June 14, 1982, until such time as respondent files a petition for a writ of certiorari in the United States Supreme Court, and that court has an opportunity to rule thereon; in addition thereto, respondent respectfully requests that should the United States Supreme Court either deny the petition for a writ of certiorari, or affirm the Eighth Circuit opinion after argument of the case on the merits, that this court once again grant respondent an additional sixty days within which to commence prosecution of Thompson.

ENFIN, in light of the foregoing, respondent respectfully requests that this court order a stay delaying any further proceedings in this case, and give the State of Missouri additional time in which to commence prosecution of Thompson, until respondent has filed a petition for a writ of certiorari in the United States Supreme Court and that court has ruled thereon; in addition thereto, respondent respectfully requests that should the United States Supreme Court either rule adversely to respondent on his petition for writ of certiorari or affirm the Eighth Circuit opinion on the merits, that the State of Missouri be given, once again, sixty days in which to begin prosecution of Thompson.

Respectfully submitted,

JOHN ASHCROFT
Attorney General

MICHAEL H. FINKELSTEIN
Assistant Attorney General

STEVEN W. GARRETT
Assistant Attorney General

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Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 22nd day of June, 1982, to:

Thomas Scott Richardson, Jr.
Richardson and Jianakoplos
International Building
722 Chestnut, Suite 1210
St. Louis, Missouri 63101

Attorney for Petitioner

MICHAEL H. FINKELSTEIN

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No. 82-314

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CARL WHITE, Superintendent, Missouri Training Center for Men, Moberly, Missouri,

Petitioner,

v.

DOUGLAS W. THOMPSON

Respondent.

BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI FROM FINAL JUDGMENT ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Thomas Scott Richardson, Jr.

722 Chestnut-Suite 1210
St. Louis, Missouri 63101
(314) 231-6900

Attorney for Respondent

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No. 82-314

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CARL WHITE, Superintendent, Missouri
Training Center for Men, Moberly, Missouri

Petitioner,

v.

DOUGLAS W. THOMPSON

Respondent.

BRIEF IN OPPOSITION TO PETITIONER'S PETITION
FOR A WRIT OF CERTIORARI FROM FINAL JUDGMENT
ENTERED BY THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

COUNTER STATEMENT OF THE CASE

On March 10, 1961, Cape Girardeau, Missouri, police officers were dispatched to a shopping center in that town to investigate an attempted robbery. After briefly stopping at the shopping center they began pursuing a "suspicious" 1955 Oldsmobile, northbound on U.S. Highway 61. The Oldsmobile subsequently pulled over to the edge of the road and one of the two police cars dispatched pulled up behind the Oldsmobile. The other police car drove past the Oldsmobile and made a u-turn and stopped, facing the "suspicious" car.

Officer Donald Crittendon, who was in the patrol car behind the Oldsmobile, approached the driver's side of the Oldsmobile and

engaged in a conversation with the driver. One of Crittendon's partners, auxiliary police officer, Herbert L. Goss, began approaching the passenger side of the automobile. Alighting from the other police car was Officer Shannon Kelley and auxiliary police officer, Robert Ross. The driver of the Oldsmobile, who was later identified as Sammy Aire Tucker, pulled a gun and shot Crittendon, mortally wounding him. It was later revealed that the passenger in the automobile was the Respondent, Douglas Wayne Thompson, and testimony at Respondent's trial by one of the surviving police officers revealed that Thompson alighted from the Oldsmobile and pulled a weapon. The officer, Robert Ross, further testified that he observed two flashes over the passenger side of the vehicle.

Auxiliary officer, Goss, who was on the right side of the Oldsmobile, was shot in the right leg at the knee and he bled to death from the wound. Evidence at trial also showed that Officer Hugo Lang, who was in the car with Crittendon and Goss, fired several shots in the direction of the Respondent. Furthermore, Respondent testified that he did not fire any shots and that Officer Goss was shot accidentally by one of the other police officers.

Respondent and Tucker sped away from the scene of the shooting, but they were later apprehended. Tucker was tried, convicted and executed for the murder of Officer Crittencon. Respondent was tried on a change of venue in Bollinger County, Missouri, for the murder of Officer Goss. Respondent was found guilty and sentenced to die in the Missouri gas chamber. Respondent appealed to the Missouri Supreme Court and his sentence was affirmed. State v. Thompson,

363 S.W.2d 711 (Mo. en banc 1963).

After spending several years on death row and with execution imminent, Respondent's family retained Attorney James Herd of St. Louis, who, at the last minute secured a stay of execution for Respondent and filed a post conviction motion under Missouri Supreme Court Rule 27.26. Respondent was successful with his post conviction motion at the appellate level when, in 1965, the Missouri Supreme Court granted Respondent a new trial because the prosecution failed to advise Respondent's defense of the existence of material evidence. 396 S.W.2d 697 (Mo. en banc 1965).

Respondent's second trial on the charge of murdering Officer Goss was held on a change of venue in Mississippi County, Missouri, in December of 1966. After a trial of four days, the jury found Respondent guilty of murder, and because of Missouri's law at the time, it was the duty of the trial judge to pronounce one of two sentences, life in prison or death in the gas chamber. It is axiomatic at this time to remember that the trial which we are concerned with was actually the second trial on this charge for Respondent. The first trial also resulted in a guilty verdict, however, at that trial Respondent was sentenced to di[illegible] In fact, Respondent's co-defendant in the case was actually ex[illegible]cuted while Respondent was on death row. After collaterally attacking the first conviction, Respondent was granted a new trial which is the trial we are examining. What occurred after the jury verdict, but before sentencing, is now in dispute, however, it is undisputed that the judge pronounced a sentence of life imprisonment and Respondent did not perfect an appeal.

On October 21, 1977, Respondent filed a Petition for Habeas Corpus Relief in the District Court for the Eastern District of Missouri. The Petition was denied without an evidentiary hearing, however, the Eighth Circuit Court of Appeals, in Thompson v. White, 591 F.2d 441 (8th Cir. 1979) reversed and remanded the case for the purpose of holding an evidentiary hearing. It was at this juncture that Respondent was appointed the undersigned attorney.

For the purposes of the Habeas Corpus proceeding it was stipulated between the parties that the jury selection process used in the instant case was a rather bizarre method. The Sheriff of Mississippi County, who at the time was W.S. Simmons, was ordered by the Circuit Judge assigned to the case to summons approximately 72 citizens to compose the voir dire panel. Sheriff Simmons was not ordered to, nor did he, utilize the master jury list which the county had compiled in his selection process. Nor did Sheriff Simmons utilize any form of random selection process; the Sheriff merely chose names of people that he personally knew and that he felt would make good jurors.

The stipulation stated that Sheriff Simmons would have testified that the only criteria he used was that he chose people he thought would answer questions truthfully on voir dire examination and who were at least 21 years of age with no criminal convictions. While selecting these individuals for inclusion in the master jury list, Sheriff Simmons was aware that Respondent was on trial for the murder of a Cape Girardeau police officer.

It is obvious from the transcript of the original trial and the evidence presented on the Petition before the District Court

that the Respondent did not make a contemporaneous Motion to Strike the Jury Panel. Mr. Herd, Respondent's trial counsel, testified at the hearing on the Petition as follows:

> Q: You made no motion to quash the entire jury panel based on any type of unconstitutional jury selection procedure?
>
> A: No sir, because I was unaware there was any basis to do so, in fact. (T-62, July 26, 1980).

The District Court denied Respondent's Petition and Respondent appealed to the United States Court of Appeals for the Eighth Circuit, which reversed and remanded the case with directions to issue a Writ of Habeas Corpus.

REASONS FOR DENYING THE WRIT

The Petitioner, Carl White, in seeking Certiorari by this Court, contends that the Eighth Circuit's Opinion granting Respondent Habeas Corpus Relief, misapplied the cause and prejudice test to be followed when determining whether federal courts should intervene in a state proceeding when the prisoner violated a state procedural rule which bars him relief in the state courts. Alternately, Petitioner argues that even if Respondent is not procedurally barred, there was no constitutional defect attendant to Respondent's trial which warrants relief.

The constitutional defect complained of by Respondent is a violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution because of the manner of jury selection employed by the State of Missouri at Respondent's trial. For a full understanding of the Eighth Circuit Court of Appeals' Opinion it is important to review prior litigation arising out of the jury selection procedures used in Mississippi County, Missouri, at the time of Respondent's trial. This is also important to explain a confusing line of argument in Appellant's petition when Appellant states that the instant case is a case based on alleged underrepresentation of a distinguishable group in the jury selection process.

Respondent's present appointed counsel was requested by Respondent because the undersigned represented Robert Ross in his successful attack on the Mississippi County, Missouri, jury selection procedures. Ross v. Wyrick, 581 F.2d 172 (8th Cir. 1978). The Ross trial was held in 1974, however, the jury panel was drawn from

a master jury list which was compiled in 1966. Therefore, it was initially assumed that the Respondent's trial, which was held in December of 1966 also had a jury selected from the unconstitutionally drawn jury panel. What was discovered, however, was far more insidious and dangerous than the jury selection procedures found unconstitutional in the Ross case.

To clear up another confusing element of Appellant's attack on the Eighth Circuit Court of Appeals' Opinion it is critical that Appellant's original defense to Respondent's Petition for Habeas Corpus relief be examined. For when the Eighth Circuit speaks of Respondent's "grisly choice" they were responding to Appellant's claim that Respondent intentionally waived his right to appeal in state courts and was, therefore, barred from seeking redress in Federal Court.

CAUSES FOR NOT MAKING A CONTEMPORANEOUS OBJECTION

Addressing the contemporaneous objection requirement first, it is important to ask ourselves the rhetorical question of why James Herd did not object to the jury panel at Respondent's trial. Answering this question we can speculate on numerous answers. The year is 1966, and many of the landmark decisions concerning jury selection are years away. Turner v. Fouche, 396 U.S. 346, 90 S. Ct. 532, 24 L. Ed.2d 567 (1970); Alexander v. Louisiana, 405 U.S. 625 92 S. Ct. 1221, 31 L. Ed.2d 536 (1972); Castaneda v. Partida, 430 U.S. 482 (1977). In fact, the most famous jury selection case, Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 259 (1965), had just been decided. And, of course, the case that specifically found Mississippi County's jury selection procedure constitutionally

defective, Ross v. Wyrick, 581 F.2d 172 (8th Cir. 1978), would not be decided for 12 years. In other words, jury selection challenges were not in vogue.

Even though the trial bar was not sensitive to jury selection techniques they were attuned to prejudice of potential jurors. The instant case was moved on a change of venue from the situs of the crime to another county in an attempt to neutralize the obvious prejudice that would result from the publicity arising out of the killing of a police officer.

Respondent is aware that this Court's recent decision in Engle v. Isaac, ____ U.S.____, 102 S. Ct. 1558, ____L. Ed.2d ____ (1982) holds that failure to make a contemporaneous objection based on the fact that a constitutional principle has not been established yet does not necessarily establish "cause". However, in the instant case, coupled with the absence of appellate decisions relating to discriminatory jury selection, is the fact that trial counsel was misled as to how the voir dire panel was actually selected. Needless to say, James Herd was not aware of the hybrid jury selection used in the instant case.

It is certainly understandable that an attorney would assume that a voir dire panel that presents itself in the court room for the trial of a case would be drawn in compliance with state law. It is ridiculous that an attorney can be faulted for failure to suspect that those charged with the administration of justice in Mississippi County would break the law. In fact, it is evident that Herd assumed that the voir dire panel would be randomly selected from the master jury list since he conferred with local counsel regarding those

people on this jury list. (T-62, July 26, 1980).

Chapter 494 of the Missouri Revised Statutes concerns itself with jury selection and it attempts to provide a random selection technique to be utilized. It is obvious in the instant case that Chapter 494 was not followed. State v. Ross, 530 S.W.2d 457, a Missouri Court of Appeals case which was overturned by Ross v. Wyrick, supra, sanctioned the use of Chapter 494, Selection Techniques in Mississippi County, but in Respondent's case we find that these procedures were not even followed.

Francis v. Henderson, 425 U.S. 536, 96 S. Ct. 1708, 48 L. Ed. 2d 149 (1976) appears to stand for the proposition that federal courts should not upset state appellate requirements that hold that a defendant must object contemporaneously with the ocmplained of error for the error to be preserved on appeal. However, this rule is not to be applied if there is a showing of actual prejudice. The Missouri Rule on this point is that an objection must be timely unless there is "plain error'. 26.20(c) Missouri Rules of Civil Procedure. This rule states:

> Plain error affecting substantial rights may be considered on a Motion for New Trial or on Appeal, in the discretion of the court, though not raised in the trial court or preserved for review, or defectively raised or preserved, when the court deems that manifest or miscarriage of justice has resulted therefrom.

And, of course, Federal Rule of Criminal Procedure 52(b) likewise allows federal courts to entertain arguments that were not "preserved" at trial when they affect substantial rights of the

individual. U.S. v. Brown, 508 F.2d 427.

It is obvious that Missouri Courts recognize exception to the Contemporaneous Objection Rule. Furthermore, it is obvious that Respondent suffered actual prejudice. Respondent was the victim of an illegal act when the Circuit Judge and the Mississippi County Sheriff violated the Missouri Statutes on jury selection procedures.

Returning to the question of why Attorney Herd did not object to the jury panel or what was the "cause" of his failure to object, it is obvious that he did not know that an illegal jury selection procedure had been implemented. Furthermore, Herd nor Respondent can be charged with failure to discover this illegal jury selection procedure.

Appellant has relied heavily in its petition on Francis v. Henderson, 425 U.S. 536, 96 S. Ct. 1708, 48 L. Ed. 149 (1976), however, this reliance is misdirected because what Francis did was re-emphasize that federal courts have the inherent power to review state court convictions. This Court in Francis stated:

> There can be no question of a Federal District Court's power to entertain an application for a Writ of Habeas Corpus in a case such as this. 28 U.S.C. §2241, §2254. The issue, as in the Davis case, goes rather to the appropriate exercise of that power. This Court has long recognized that in some circumstances considerations of comity and concern for the orderly administration of criminal justice require a Federal Court to forego the exercise of its Habeas Corpus power. see Fay v. Noia, 732 U.S. 391, 425,426; Francis v. Henderson,

supra.

The Supreme Court's holding in Francis, however, does not prevent Federal Court intervention in all cases where the Petition did not make a contemporaneous objection to a constitutional defect. The Francis Court concluded:

> We conclude, therefore, that the Court of Appeals was correct in holding that the rule of Davis v. United States applies with equal force when a Federal Court is asked in a Habeas Corpus proceeding to overturn a State Court conviction because of an allegedly unconstitutional grand jury indictment. In a collateral attack upon a conviction that rule requires, contrary to the petitioner's assertion, not only a showing of 'cause' for the defendant's failure to challenge the composition of the grand jury before trial, but also a showing of actual prejudice. Francis v. Henderson, supra.

The cause-prejudice test for determining if a Writ should issue, even though a state procedural rule was violated, was also discussed in Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed.2d 594 (1977). The Opinion in Wainwright indicates that the Supreme Court was concerned with attorneys "sandbagging" the trial courts. That is, trying their cases and hoping for a not guilty verdict, but if their clients were convicted they then would begin making their constitutional challenges. Therefore, the Supreme Court in Wainwright v. Sykes, Francis and Davis held that for the alleged error to be cognizable in a habeas corpus proceeding the petitioner must show cause and prejudice.

Obviously, there was no "sandbagging" in Respondent's case.

Respondent's attorney did not dream that a challenge to the jury selection process would even be successful; Attorney Herd had never even contemplated a motion to quash a jury panel and, therefore, he could not have been holding back any constitutional challenge for later appellate purposes.

ACTUAL PREJUDICE SUFFERED BY RESPONDENT

It is respectfully argued that the Eighth Circuit Court of Appeals' Opinion clearly falls within this Court's cases which have developed a cause-prejudice rule. The cause-prejudice rule has obviously been established to limit the abuse of Federal Habeas Corpus Petitions while at the same time allowing federal courts to intervene when justice dictates. In the landmark case of Fay v. Noia, 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed.2d 837 (1963) Justice Brennan, writing for the majority of the court, concluded his Opinion as follows:

> It should be unnecessary to repeat what so often has been said and what so plainly is the case: that the availablility of the Great Writ of habeas corpus in the Federal Courts for persons in the custody of the State offends no legitimate state interest in the enforcement of criminal justice of procedure. Our policy today swings open no prison gates. Today, as always, few indeed is the number of state prisoners who eventually win their freedom by means of Federal Habeas Corpus. Those few who are ultimately successful are persons whom society has grievously wronged and for whom belated liberation is little enough compensation. Surely no fairminded person will contend that those who have been deprived of their

liberty without due process of law ought, nevertheless, to languish in prison. Noia, no less than his co-defendants, Caminito and Bonino, is conceded to have been the victim of unconstitutional state action. Noia's case stands on its own: But surely no just and humane legal system can tolerate a result whereby a Caminito and a Bonino are at liberty because their confessions were found to have been coerced; yet a Noia, whose confession was also coerced, remains in jail for life. For such anomalies, such affronts to the conscience of a civilized society, habeas corpus is predestined by its historical role in the struggle for personal liberty to the ultimate remedy. If the states withhold effective remedy, the federal courts have the power and the duty to provide it. Habeas Corpus is one of the precious heritages of Anglo-American civilization. We do no more today than confirm its continuing efficacy.

Turning now to an examination of the actual jury selection used in Respondent's trial, it is hard to envision a more blatant case of jury packing. A law enforcement officer in the county, Sheriff Simmons, chose people he personally knew for inclusion on the voir dire panel. This is the antithesis of random jury selection. Furthermore, the Sheriff was fully aware of the nature of the case when he went out to serve the summonses on the potential jurors and there was nothing to prevent him from "screening" the people to determine if their views would comport with his own views on the case.

Ross v. Wyrick, supra, demonstrated that the "sanctioned" jury

selection method used in Mississippi County was unconstitutional because of an imbalance between the number of blacks in the county and the number of blacks included in the master jury list. Initially, in the preparation of this case it was assumed that this unconstitutional system was used in Respondent's trial. But what was discovered was by far a more insidious and obviously illegal method of jury selection.

In challenging the jury selection plan the burden of proving a prima facia case of constitutional invalidity falls on the challenger; at the outset the plan is presumed to be valid. Tarance v. Florida, 188 U.S. 519 (1903); United States v. Hyde, 448 F. 2d 815, N. 14 (5th Cir. 1971). "The cases reveal three generally accepted methods for establishing a prima facia case; they relate to the three logically important points of all selection systems; the source of names with which the system starts, the process itself, and the results obtained. Vulnerability at any one of these points will be sufficient to support a prima facia case." David Kairy, Juror Selection; the Law, a Mathematical Method of Analysis and a Case Study, 10 Am. Crim. L. Rev. 771,778 (1972).

The first point in the examination is where the names were obatined. The names were obtained through no random method, they were straight from the Sheriff's own head and conscience. He chose only people he was personally acquainted with. This is certainly the most blatant "key man" system of jury selection ever discovered. A key man system is not unconstitutional per se, Carter v. Jury Commissioners, 396 U.S. 320 (1970), however, it is immediately suspect. In the Eighth Circuit case of Sanford v. Hutto, 394 F.2d

1383 (8th Cir. 1965) the Court was disturbed by the use of the "key man" system of jury selection. At the District Court level, Judge Henley, who was at that time a District Judge, stated on this point:

> The commissioners could only choose persons with whom they were personally acquainted or persons who had been recommended to them by other responsible citizens ...the result is that a given jury selected by these commissioners is only an extension of the commissioners' personalities ...obviously, an opportunity to discriminate existed since, if each commissioner chose only persons he knew, then he was aware of the race of each person considered. 394 Fed. Supp. at 1282, 1283.

In Sanford, the District Court also relied on Smith v. Texas, 311 U.S. 128, 61 S. Ct. 164, 85 L. Ed. (1941) where the Supreme Court observed:

> Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintances, discrimination can arise from commissioners who know no negroes as well as from those commissioners who know, but eliminate them. If there has been discrimination, whether accomplished ingeniously or ingenously, the conviction cannot stand. [Quoted from Murrah v. State of Arkansas, 532 F. 2d 105, 109, 110 (8th Cir. 1976)].

Murrah further stated: "....as long as a 'key man' system prevails, utilizing subjective criteria, any disparity is more suspect and the state carries a heavy burden." 532 F.2d 105, 110.

The second point in attacking a jury selection system is the method in which it is utilized. In the instant case it must be

conceded that the method used by Judge Craig and Sheriff Simmons was highly unusual. It must be remembered that all of the cases discussed have spoken of selection techniques used in compiling a jury panel that is then used as the source to draw names from to compose the voir dire panel for a specific trial. In the instant case, what we have is a "key man" system being used for a particular case. This, of course, is unheard of in modern jurisprudence and is totally unacceptable.

The Sixth Amendment to the United States Constitution is the cornerstone of our jury system and it mandates that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed." U.S. Const. Amend. VI. Certainly the Respondent did not have an impartial jury when it was the hand picked jury of the county sheriff.

The third method of attacking a jury selection system is the result. Statistically, Mississippi County, at the time of the 1970 census, had a population of 16,647; of that number, 3,523 or 21.16% were black. The 1966 voter registration list indicated that 8,028 citizens were registered and that 1,557 or 19.04% of those registered were black. The master jury list which should have been used in Respondent's case consisted of 964 individuals and of these only 33 or 3.4% were black, demonstrating an obvious unconstitutional disparity. Ross v. Wyrick, supra.

If we examine the voir dire panel which we might equate with a master jury list in the instant case, it consisted of approximately 72 citizens and it was stipulated that of these 72 people, Sheriff

Simmons chose approximately seven black individuals. Statistically, the seven blacks composed 9.7222% of the voir dire panel, resulting in a disparity of over 10% between the blacks on the voir dire panel and blacks in the general population. Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 73 L. Ed.2d 759 (1965) stands for the proposition that a disparity of over 10% is suspect.

The fact that Respondent is white is of no import. A white individual has standing to complain of a jury system that discriminates against a cognizable class such as blacks. Taylor v. Louisiana, 419 U.S. 522 (1975); Peters v. Kiff, 407 U.S. 493 (1972);

A fourth accepted basis for establishing a prima facia case is whether there is a violation of statutory procedures or standards. "Courts quite uniformly require strict compliance with the statutory mandates concerning both selection procedures and substantive standards for selection, holding, explicitly or implicitly, that noncompliance with statutory mandates renders the jury illegal and invalidates its actions". Ballard v. United States, 329 U.S. 187 (1946); Thiel v. Southern Pacific Company, 328 U.S. 217 (1946); United States v. Zirpolo, 450 F.2d 424 (3rd Cir. 1971); Abbott v. Mines, 411 F.2d 353 (6th Cir. 1969); Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966) [Quoted from Jurywork: Systematic Techniques, published by the National Jury Project (1979) p. 87].

Obviously, in the instant case the statutory scheme mandated by Chapter 494 of the Missouri Revised Statutes was completely circumvented and violated. Chapter 494 outlines a detailed plan to attempt to comply with the Sixth Amendment. There must be jury commissioners who select not less than 400 names of qualified in-

dividuals for the master jury list and these individuals must be selected from each township of the county. Provisions further elaborate that the names must be placed in a box and be thoroughly mixed for random selection. §494.240 Mo. R.S.

The illegal technique used by the sheriff did not only result in a vior dire panel which was racially underrepresented but the method more frightfully resulted in a hand picked jury. §494.290 Missouri Revised Statutes vaguely refers to ordering new panels of jurors if there is an extraordinary need. However, it is strongly urged that for the foregoing reasons, Respondent has made a prima facia case of jury selection discrimination. Once the moving party established prima facia case of discrimination, the burden then shifts to the government to overcome this burden. Turner v. Fouche, 396 U.S. 394 (1970); Sims v. Georgia, 389 U.S. 404. It is obvious that the State has not met this burden since they did not present any evidence to refute Respondent's clear indication of an unconstitutional jury selection system in Mississippi County which severely prejudiced Respondent.

CONCLUSION

Petitioner argues that the Eighth Circuit's second Opinion, issued after this Court remanded the instant case for reconsideration in the light of United States v. Frady, ____U.S.____, 102 S. Ct. 1584 ____ L. Ed.2d ____ (1982) is not in comport with this Court's Opinion in Engle v. Isaac, supra. Beyond being erroneous, Petitioner says that the Eighth Circuit's rationale "....smacks of arbitrary and capricious judicial make-believe." Petitioner's petition, p. 22. Furthermore, Petitioner believes that the Eight Circuit has an

"....overactive imagination". Petitioner's petition, p. 20. It appears as if the Petitioner would only be satisfied if this Court would strike the protection of the Writ of Habeas Corpus from the Constitution. Article I, Section Nine.

This Court, in Engle v. Isaac, supra, clearly acknowledged the vitality and importance of Habeas Corpus when it stated that "....today, as in prior centuries, the Writ is a bulwark against convictions that violate fundamental fairness." 102 S. Ct. 1558, 1570. Respondent can imagine no clearer violation of fundamental fairness than when a criminal jury is screened and hand picked by a law enforcement officer. The cause for not objecting to this procedure is clear when neither Respondent nor his trial counsel were aware of this system; in fact, they did not become aware of it for 15 years. The actual prejudice suffered by Respondent is also abundantly clear when the due process and Sixth Amendment violation infected the entire trial from the very outset.

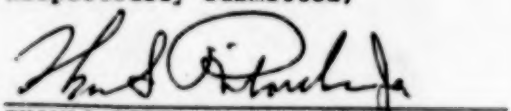
This Court, in Engle v. Isaac, supra, recognized that:

> ....the terms 'cause' and 'actual prejudice' are not rigid concepts; they take their meaning from the principles of comity and finality... In appropriate cases, those principles must yield to the imperative of a fundamentally unjust incarceration. Since we are confident that victims of a fundamental miscarriage of justice will meet the cause - and - prejudice standard. 102 S. Ct. 1558, 1575.

It is respectfully submitted that Respondent, Douglas W. Thompson, suffers from a fundamental miscarriage of justice and that he has met the cause - and - prejudice standard. Therefore, for the fore-

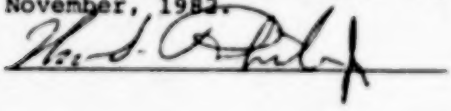
going reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



THOMAS SCOTT RICHARDSON, JR.
Attorney for Respondent
722 Chestnut-Suite 1210
St. Louis, Missouri 63101
231-6900

Two copies of the foregoing brief served upon opposing counsel of record, Michael H. Finkelstein, Assistant Attorney General for the State of Missouri, Broadway State Office Building, 8th Floor, P.O. Box 899, Jefferson City, Missouri 65102, this 12th day of November, 1982.



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IN THE
SUPREME COURT OF THE UNITED STATES

CARL WHITE, etc.,	)	
Petitioner,	)	
vs.	)	No. 82-314
DOUGLAS W. THOMPSON,	)	
Respondent.	)	

MOTION TO PROCEED IN FORMA PAUPERIS

Comes now Respondent, Douglas W. Thompson, by and through his attorney and moves to proceed in forma pauperis, and as grounds therefor, states:

1. That at the time the Respondent filed his original Petition for Habeas Corpus Review in the District Court for the Eastern District of Missouri he was granted leave to proceed in forma pauperis and the undersigned attorney was appointed under the provisions of the Criminal Justice Act.

2. That when the instant case progressed to the United States Court of Appeals for the Eighth Circuit, Respondent was again granted leave to proceed in forma pauperis and the undersigned attorney was again appointed to represent Respondent under the provisions of the Criminal Justice Act.

3. That Respondent has no funds to pay for the expenses of printing his Brief in Opposition to Petitioner's Petition for a Writ of Certiorari and is requeting leave file a typewritten brief.

WHEREFORE, Respondent respectfully moves for leave to proceed in forma pauperis in the above styled case.

Thomas Scott Richardson, Jr.

Subscribed and sworn to before me this 12th day of November, 1982.

Charlotte McAleenan
Notary Public

CHARLOTTE McALEENAN
NOTARY PUBLIC, STATE OF MISSOURI
MY COMMISSION EXPIRES 10/13/84
ST. LOUIS COUNTY

Two copies of the foregoing motion were served upon opposing counsel of record, John Ashcroft, Attorney General of Missouri this 12th day of November, 1982.